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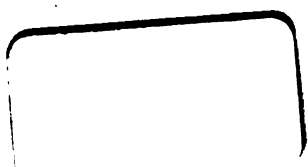
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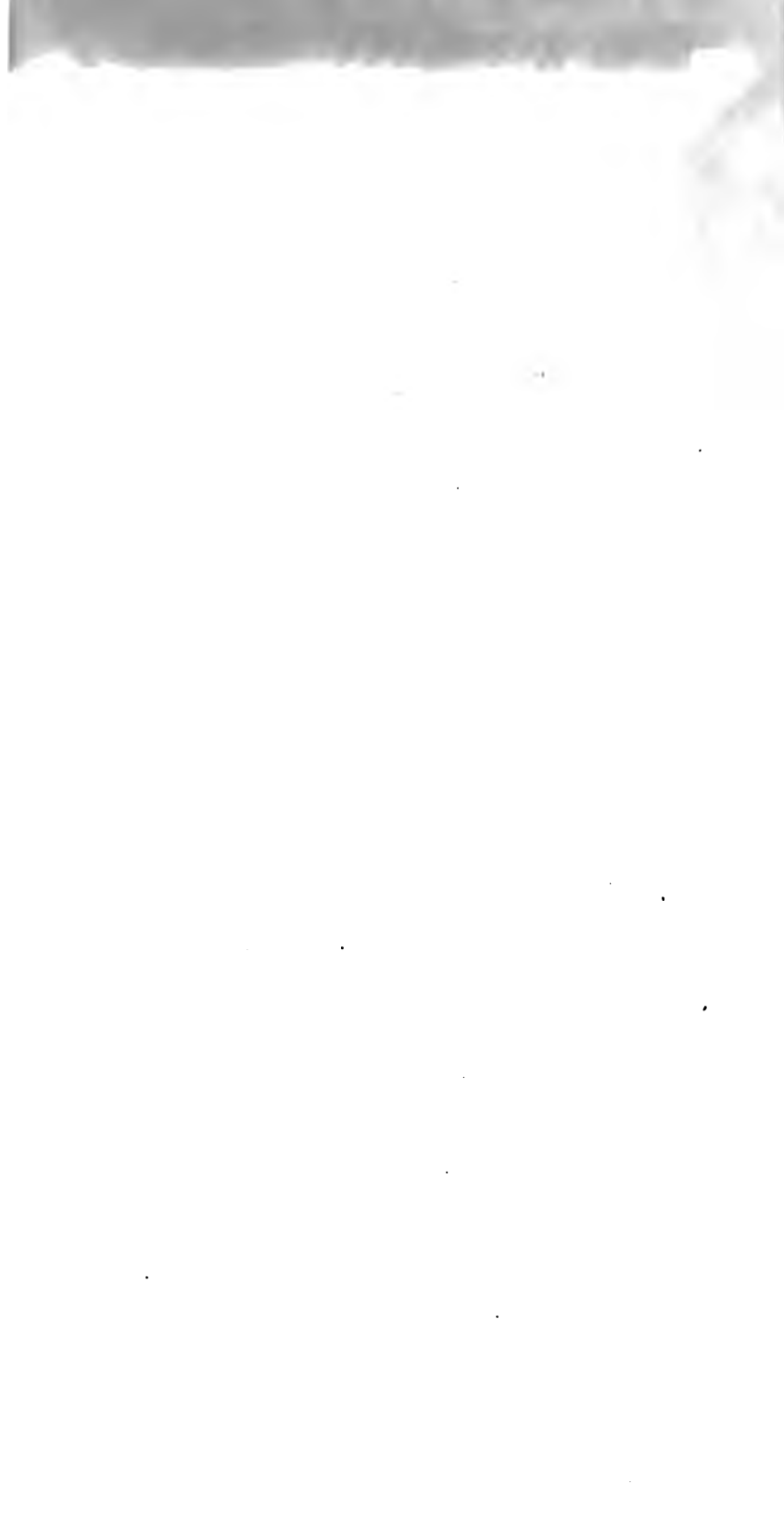
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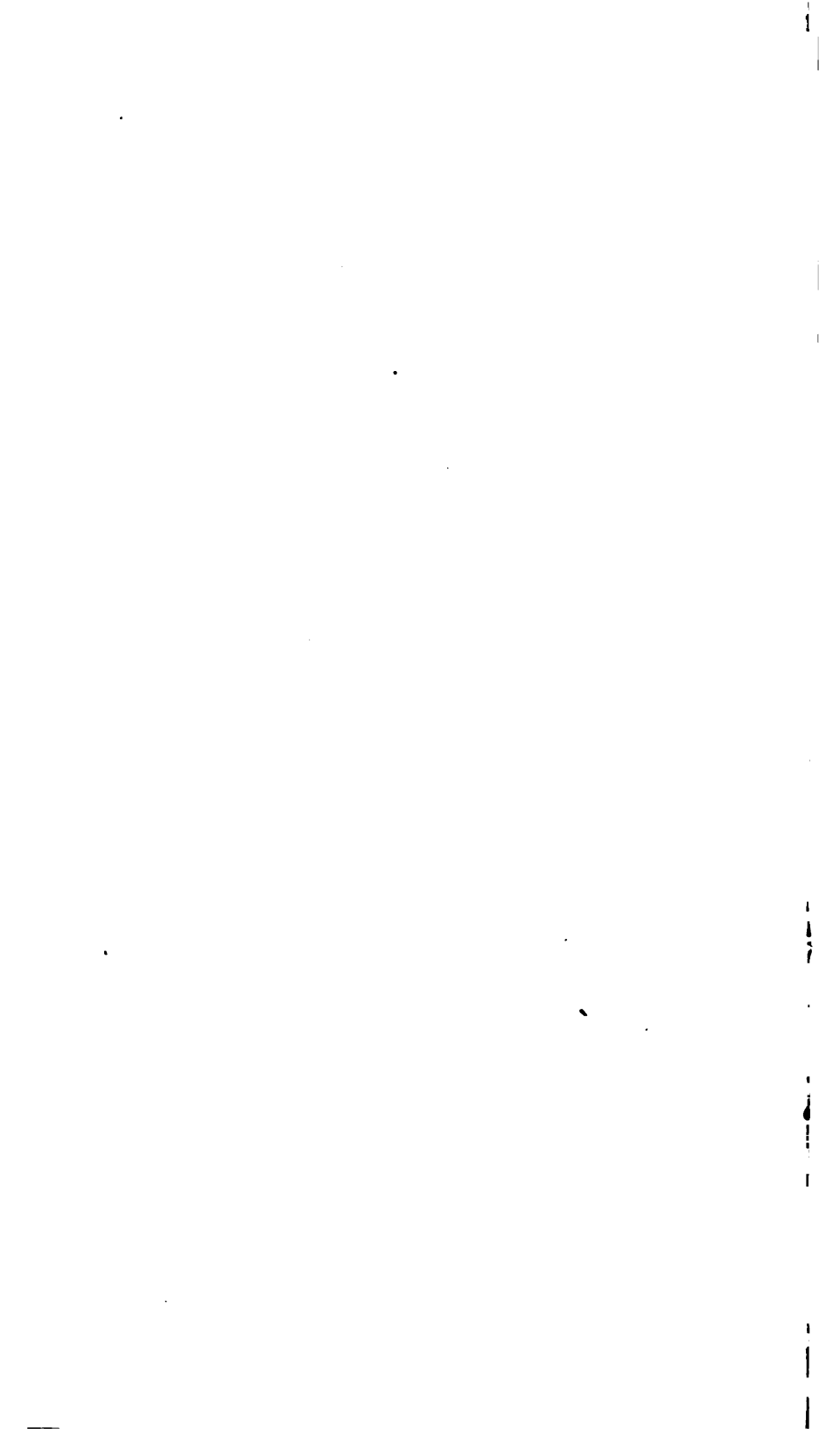
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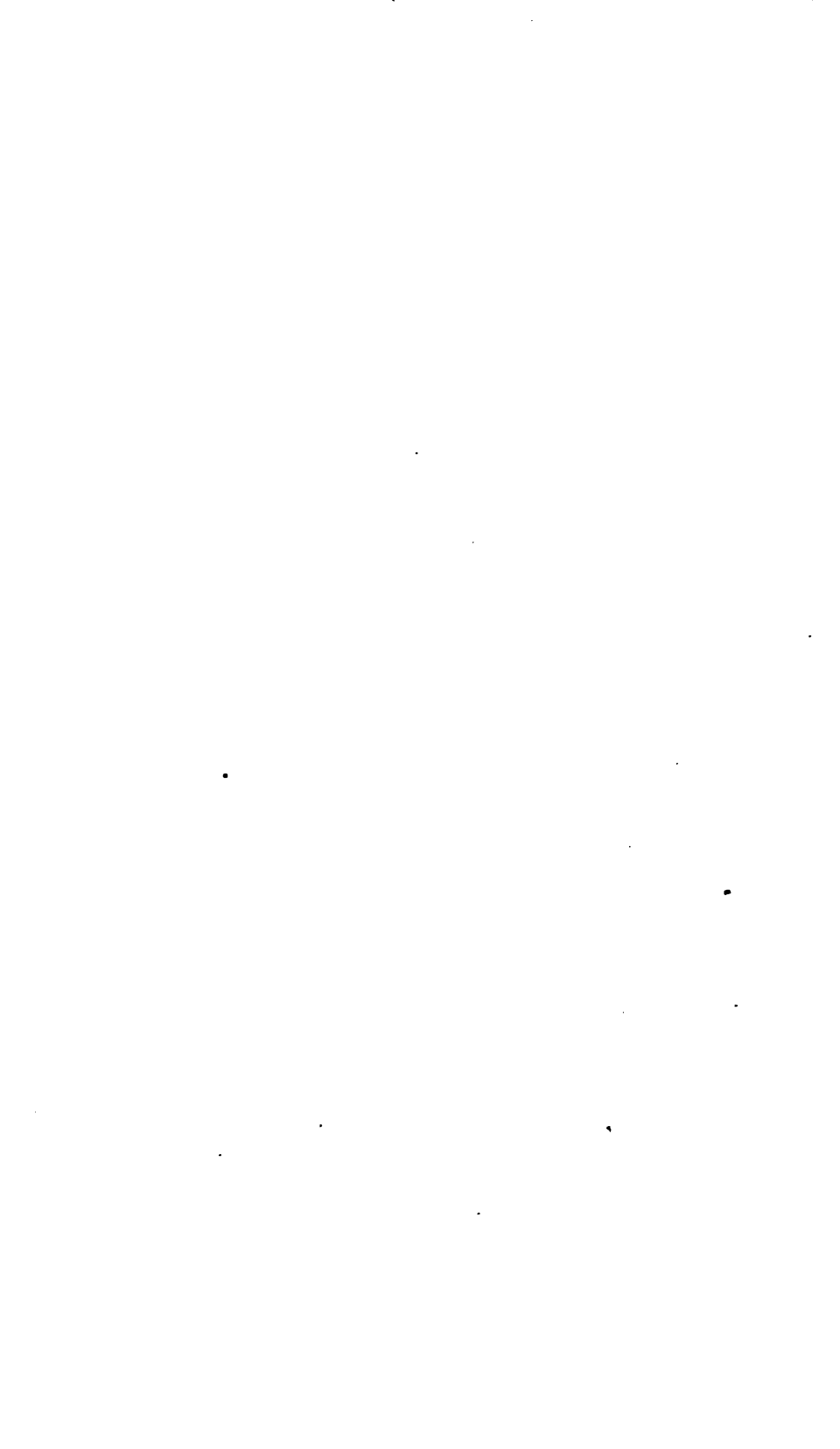
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1860.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES, ETC.

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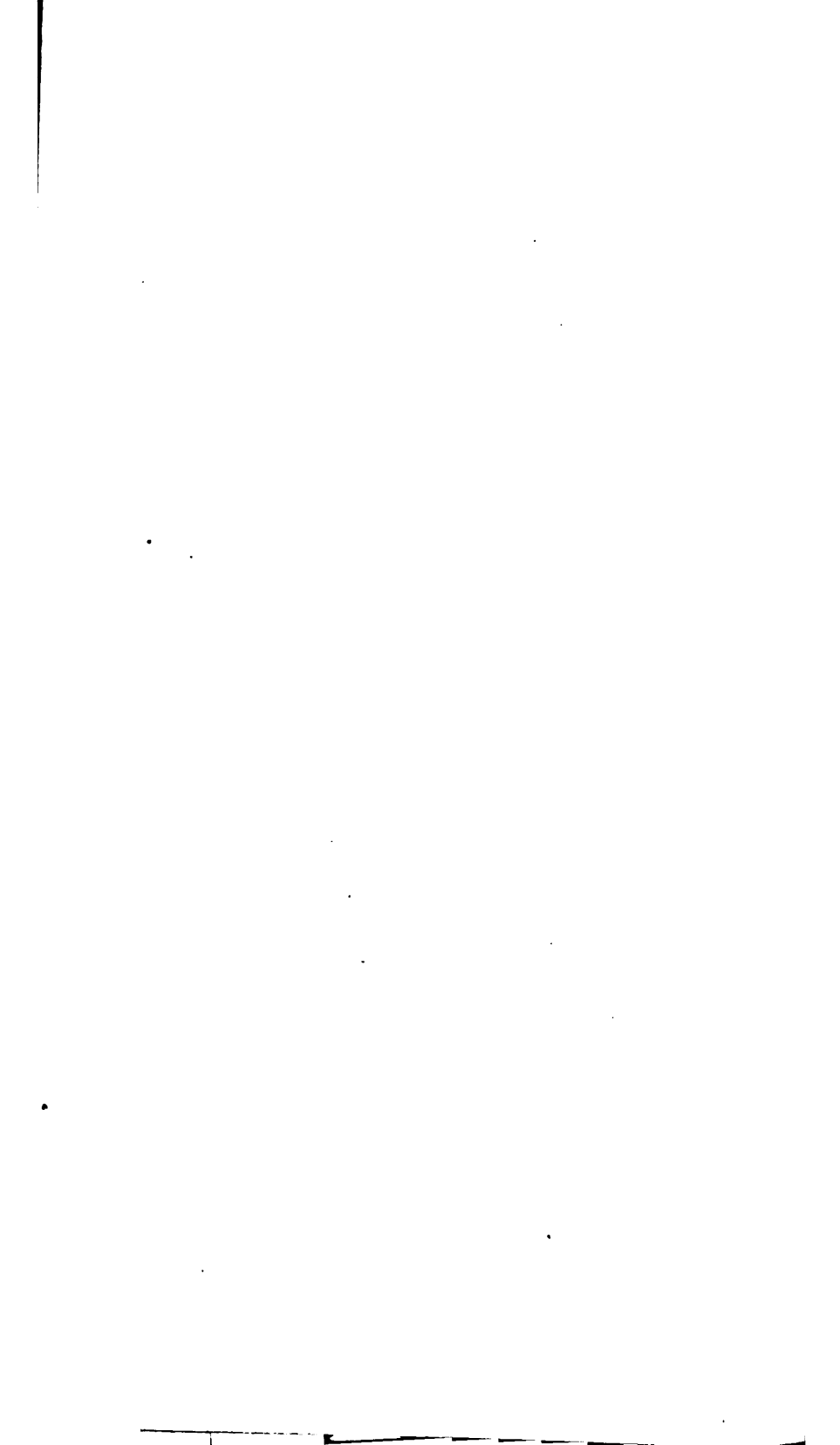
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AMERICAN DECISIONS
VOL. XXIX



CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BEAUMONT'S CASE.

[1 WHARTON, 52.]

TERM NON COMPOS MENTIS HAD ACQUIRED A FIXED LEGAL IMPORT, prior to the adoption of the constitution of Pennsylvania, denoting a person entirely destitute or bereft of his memory and understanding, and it was with this signification that the term was introduced into the constitution and subsequent legislation of this state; therefore none of our courts have power or authority to change this meaning so as to include any other description of persons, in a proceeding of lunacy, than such as shall appear to come fairly within the meaning so affixed to it.

RETURN OF INQUISITION, HELD UNDER COMMISSION in nature of writ *de lunatico inquirendo*, that the party, "by reason of old age and long-continued sickness, has become so far deprived of reason and understanding, as to be wholly unfit to manage his estate," is not a sufficient finding that he is *non compos mentis*.

CERTIORARI to the court of common pleas of Bucks county. On the petition of John T. Neely, setting forth that John Beaumont had become unfit to manage his estate, and was wasting and destroying the same, the court of common pleas of that county issued a commission in the nature of a writ *de lunatico inquirendo*, upon which the commissioners and jury returned: That "the said John Beaumont, at the time of taking this inquisition, by reason of old age and long-continued sickness, has become so far deprived of reason and understanding, as to be wholly unfit to manage his estate, and hath been so for the last eighteen months and upwards." The jury also found that he was seventy-five years old. On the return of the inquest, an exception, on the part of Beaumont, was filed, that

the finding was defective, and insufficient to give the court jurisdiction. The court, being of this opinion, quashed the inquisition; and the proceedings being removed into this court, the decision on this point was assigned for error.

Ross, for the plaintiff in error.

Randall, *contra*.

By Court, KENNEDY, J. This case presents but one question, and that is, whether the finding of the inquest shows that John Beaumont was *non compos mentis*, within the meaning of this phrase or term, as used in the sixth section of the fifth article of the constitution, whereby the supreme court, and the several courts of common pleas of this state, among other things, are "invested with the power of a court of chancery, so far as relates to the care of the persons and estates of those who are *non compos mentis*." On the part of the relator it has been argued, that according to the general sense and understanding of this term, as received and acted on in chancery, the state and condition of Beaumont, as represented by the inquest, falls clearly within it; and in support of this Sir William Blackstone has been vouched; where, in the second volume of his Commentaries, 304, he says: "A lunatic, or *non compos mentis* is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic, indeed, is properly one that hath lucid intervals: sometimes enjoying his senses, and sometimes not; and that frequently depending on the change of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name), are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs." It is this latter sentence that is relied on; for which, it may be observed, the learned commentator cites no authority.

Mr. Fonblanque, in his treatise on equity, vol. 1, p. 63, note p, has transcribed the above passage, and observes that he was induced to do so "in order to obviate the error into which the learned commentator seems to have fallen, in the concluding sentence." He then proceeds by saying, that "the rules of judging upon the point of insanity being the same at law and in equity (*Osmond v. Fitzroy*, 3 P. Wms. 130; *Bennett v. Vade*, 2 Atk. 327), the courts of chancery can not assume any kind of

discretion upon the subject; and, therefore, in *Ex parte Barnsley*, 3 Atk. 168, the return of the inquest, stating 'that W. B. was at the time of taking the inquisition, from the weakness of his mind, incapable of governing himself, and his lands and tenements,' was held illegal and void; and many adjudged cases being cited to the same effect, Lord Hardwicke congratulated himself that, except in two or three instances, the return had been that he is *lunaticus*, or *non compos mentis*, or *insanæ mentis*, or, since the proceedings have been in English, of unsound mind; which amounts to the same thing." And afterwards, in 1751, Lord Hardwicke, in *Lord Donegal's case*, 2 Ves. 407, according to the same principle, refused a commission of lunacy; though there appeared to be an extreme degree of weakness of understanding and imbecility of mind on the part of Lord Donegal.

In order, however, to come to a correct conclusion on the present question, it is proper to inquire and to ascertain first, whether the term *non compos mentis*, had not acquired a legal and technical meaning at, and anterior to the formation of the constitution of this state, in 1791; because, if it had, I take it, that we are bound to interpret it accordingly; and this, or any other court in the state, has no power or authority to change it, so as to include any other description of persons in a proceeding of lunacy, than such as shall appear to come fairly within the meaning so affixed to it. Seeing we have derived the most of our legal terms and phrases, as well as principles from the English common law, a reference to it, and the decisions of the courts of England in relation thereto, may not be amiss, in order to obtain some light upon the subject.

Littleton, section 405, speaks of a man of non-sane memory, as one who is *non compos mentis*; upon which Lord Coke, in his commentary, Co. Lit. 246, b, 247, a, says: "Here Littleton explaineth a man of no sound memory to be *non compos mentis*. Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not, *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like; for *non compos mentis* is the most sure and legal." Now, it is obvious that Lord Coke considered *non compos mentis* not only the legal, but the sure term, and not, *amens*, *demens*, etc. He also divides *non compos mentis* into four sorts: "1. An idiot, who, from his nativity, by a perpetual infirmity, is *non compos mentis*; 2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding; 3. A lunatic, who hath sometimes his understanding

and sometimes not, *aliquando gaudeat lucidis intervallis*; and therefore is called *non compos mentis*, so long as he hath not understanding. Lastly, he that, by his own vicious act, for a time depriveth himself of his memory and understanding, as he that is drunken. And this last kind of *non compos mentis* shall give no privilege or benefit to him or his heirs." And in *Beverly's case*, 4 Co. 124, a *non compos mentis* of the second sort, is described to be "he who was of good and sound memory, and by the visitation of God lost it." Now, it must be admitted, that there are various degrees of memory and understanding, from that of the most powerful and vigorous, down to that of the most abject and imbecile, yet it is perfectly manifest that Littleton and Lord Coke did not consider a *non compos mentis* as embraced within any of the several grades of mind, but as one wholly destitute of it, at least occasionally, that is, of both memory and understanding. And such, I apprehend, was the prevailing sentiment down to the time of Lord Hardwicke, who, in 1745, decided the case of *Barnsley*, already mentioned, in conformity to it.

In 3 Atk. 173,¹ he says, "being *non compos mentis*, of unsound mind, are certain terms in law, and import a total deprivation of sense; now weakness does not carry this idea along with it; but courts of law understand what is meant by *non compos*, or insane, as they are words of a determinate signification." Then he gives Lord Coke for authority, "that they are persons of non-sane memory;" and adds, "*non compos mentis* is used in the statute of limitations, so that it is legitimated now, under several acts of parliament." Hence it would appear, that *non compos mentis* had become a technical term in the English law, of fixed and determinate import, denoting a person entirely destitute or bereft of his memory and understanding. And as conveying this idea, it was clearly introduced into acts of legislation in Pennsylvania, while an English province; for instance, in the "act for the limitation of actions," passed the twenty-seventh of March, 1713. And since we became an independent state, it has been uniformly used by our legislature in all their acts, wherever it has been employed, in the same sense. This being the case, it can not be doubted for a moment, but the words, *non compos mentis*, were used by the framers of the constitution, for the purpose of giving the courts power to appoint committees, to take care of the persons and estates of such persons only as should be found to be wholly void of

1. *Ex parte Barnsley*.

memory and understanding, or in other words, of unsound mind, and not of such, as had, according to the finding of the inquest in this case "by reason of old age and long-continued sickness, become so far deprived of reason and understanding, as to be wholly unfit and unable to manage his estate." The reasonable inference to be drawn from the finding of the jury here is, that Beaumont was not wholly deprived of his reason and understanding; that, on the contrary, he still retained a portion of it, but not sufficient, in their estimation, for the management of his estate, though enough, it would seem, for the care of his person; because they have said nothing of his incompetency for that purpose; and of course, the court would not have been warranted in appointing a committee to [take] care of his person, as he was not found to be of unsound mind, or incapable himself of taking care of it.

The finding of the jury is somewhat similar to that in *Cranmer's case*, 12 Ves. 445, where they found that "he was so far debilitated in his mind, as to be incapable of the general management of his affairs;" and Lord Chancellor Erskine said, in observing upon it, "how can I tell what is so far debilitated in his mind as not to be equal to the general management of his affairs?" He considered the finding too ambiguous, and therefore quashed the inquisition; though he was of opinion, that the evidence would have justified the jury in finding that the party was of unsound mind; "so that he was not sufficient for the government of himself, his manors, etc.," all of which was found by a subsequent jury and held good. It is true, however, that the court of chancery in England, has of late gone beyond what Lord Hardwicke, sitting as chancellor, thought was his proper limits; and has applied commissions, not *de lunatico inquirendo*, however, which are uniformly applied to the case of all such as are considered *non compos mentis*, but commissions in the nature of those of lunacy, to cases where there is such an imbecility of mind as renders a person incompetent to the management of his affairs, or liable to be imposed on: See 1 Wooddes. 411; *Ridge-way v. Darwin*, 8 Ves. 65, 66; *Ex parte Cranmer*, 12 Id. 447, and Mr. Bell's note to *Lord Donegal's case*, 2 Id. 407, 408. But this latter description of persons must not be confounded with those who are *non compos mentis*; whose voluntary deeds will be set aside at once upon its being shown that they were such at the time of executing them; but in regard to the like deeds of the former, it is only when connected with circumstances tending to show that they were obtained by fraud, that they will be

set aside: *Osmond v. Fitzroy*, 3 P. Wms. 130, 131; *Griffin v. De Veulle*, 3 Wooddes. App. 16. So in *Wightman v. Wightman*, 4 Johns. Ch. 343. Chancellor Kent said, that idiots and lunatics are incapable of entering into the matrimonial contract; and that such marriages are *ipso facto* void, is a proposition too plain to be questioned. In short, the distinction between those who are styled *non compos mentis* in law, and those who labor under extreme imbecility of mind, is very clearly maintained throughout every part of it: and in order to prevent confusion it may be important, perhaps, that this distinction should continue to be observed. And until the legislature shall authorize the courts of this state to entertain a proceeding, with a view to deprive the latter description of persons of all control and power over their estates, they can not take cognizance of it. The exercise of such authority over the rights of the citizens, is of too much moment to be claimed by courts, unless given expressly by the constitution or some act of the legislature, which has not been done as yet. The judgment is affirmed.

SERGEANT, J., having been of counsel with one of the parties, did not sit in the case.

Judgment affirmed.

NON COMPOS MENTIS, who deemed to be, as respects capacity to make contracts: See the note to *Jackson v. King*, 15 Am. Dec. 361. See also, *Owings' case*, 17 Id. 311. In *McElroy's case*, 6 Watts & S. 451, it was decided that upon a traverse of the inquisition, found upon a commission of lunacy, the question is, whether the mind is deranged to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs and discharging his relative duties. Huston, J., who delivered the opinion, seems to question the accuracy of the doctrine laid down by Kennedy, J., in the principal case, on this point. He says: "The words 'wholly lost his memory and understanding,' and the expression attributed to Lord Hardwicke in 3 Atk. 173, being *non compos mentis*, of unsound mind, are certain terms in law, and import a total deprivation of sense; and these expressions adopted by Judge Kennedy in delivering the opinion of this court in quashing the inquisition in *Braumont's case*, 1 Whart. 55, were quoted and relied on by the counsel of the traverser in this case. Although Atkyns is an elegant and generally a correct reporter, yet it must be recollected, that in his day the chancellor did not write his own opinions and give them to the reporter, and that the expression may not have been used by the chancellor. But if it was used, it proves little. The words 'of unsound mind' had been used in the returns on inquests, and were omitted in that case; and for this cause the inquisition was quashed, and that weakness of understanding, as expressed, was not equivalent, was decided. The words, *non compos mentis*, or unsound mind, were held necessary in point of form, and nothing more; for in the same book (p. 184) we find an inquisition on the same person, stated to have

been found on the same evidence, but in form stating Barnaley to be of unsound mind and incapable of managing his estate, was affirmed."

So in *Commonwealth v. Schneider*, 59 Pa. St. 328, it was determined that in order to subject one to a commission of lunacy it was not necessary that there should be a total deprivation of sense, an entire "blotting out" of the mind, as the court below had ruled, but that it was sufficient if the state of mental unsoundness was such as to incapacitate the person from taking care of himself or of his business. Referring to the opinion of the court below on this point, Thompson, C. J., said: "The learned judge fell into error by following the lead of *Beaumont's case*, 1 Whart. 52, which seems mainly to have been rested on *Barnaley's case*, 3 Atk. 168, which we have seen Lord Eldon refused to follow in *Ridgeway v. Darwin* [8 Ves. 65]. *McElroy's case* [6 Watts & S. 451] must be regarded as a modification of the ruling in *Beaumont's case*, which was that the finding of the inquest, by reason of old age and long-continued sickness, has become so far deprived of reason and understanding as to be wholly unfit to manage his estate, 'was an insufficient finding that the person was *non compos mentis* so as to place him in charge of a committee.' It is obvious that this decision was rested rather on a question of the disease of the mind than on its capacity to act rationally. We have seen that the latter is the practical test, while the former must often be theoretical and speculative."

FRITZ v. THOMAS.

[1 WHARTON, 66.]

NO ACKNOWLEDGMENT BY AN ADMINISTRATOR OF A DEBT OF HIS INTESTATE, barred by the statute of limitations, can preclude him from pleading the statute to a count on the original cause of action; and no action on his own promise lies against him in his official character.

ERROR to the court of common pleas of Montgomery county. In 1833, Fritz brought an action of assumpsit against Thomas and Maulsby, the administrators of Fitzwater, deceased, to recover the amount of a promissory note dated in 1818, and drawn by said Fitzwater in his life-time in favor of said Fritz. The declaration alleged a promise by the intestate in his life-time, and also a promise by his administrators since his death. Pleas: *Non assumpsit*, *non assumpsit infra sex annos*, *actio non accrevit infra sex annos*, and payment; upon which issue was joined. On the trial, the plaintiff offered the note in evidence; the defendant objected, and the court sustained the objection, and rejected the note on the ground that it was on its face barred by the statute of limitations, and could not be received as evidence of a debt, until proof of a promise to pay within six years was first made. The plaintiff then called a witness, by whom he showed that when he presented the note for payment to defendant Thomas, the latter said: "I have no funds in hand to pay you; but the debt is a just one; I will see my col-

league, and we will do what we can for you." The note was, after the introduction of this testimony, again offered in evidence, but was objected to by the defendants' counsel, and the court being of opinion that the evidence was not sufficient to take the case out of the statute of limitations, refused to admit it. The president of the court charged the jury that there was no evidence before them upon which they could find a verdict for the plaintiff, and directed them to find for the defendants, which they did. The plaintiff removed the record into this court, and assigned as errors: 1. The refusal of the court below to admit the note in evidence in the first instance. 2. The refusal of the court to allow the note to go to the jury, after the evidence of a new promise had been given.

Sterigere, for the plaintiff in error.

Tilghman, for the defendants in error.

By Court, GIBSON, C. J. The concession that the plaintiff's claim is just, and the promise to see what could be done for him, would doubtless be sufficient to maintain an action, if the consideration were the defendants' own debt. But can any acknowledgment by an executor or administrator, preclude him from pleading the statute of limitations to a count on the original cause of action? In *Jones v. Moore*, 5 Binn. 573 [6 Am. Dec. 428], and subsequently in *Bailey v. Bailey*, 14 Serg. & R. 195, and *Scull v. Wallace*, 15 Id. 231, it was doubtless taken for granted, that a recovery may be had against a plea of the statute, on proof of an acknowledgment by the personal representative. But it is to be remarked, that the point has not been adjudged, and that no recovery has in fact been had; and the inquiry is consequently not clogged by the authority of a precedent. In respect to the first of those cases, it is fair, too, to say it was the first step taken by this, or perhaps any other court, in returning to the spirit and letter of the statute. But when it was determined that a recognition of the old debt is no more than evidence of a new promise, which, when made to the representative of a decedent, can be sued by him but in a personal character, it was virtually determined that the same recognition by a personal representative, is but evidence of a new promise, on which he may not be sued, otherwise than in his personal character, without overturning some of the most firmly fixed principles of the law; for nothing is better settled than that an executor or administrator is answerable in his official character, for no cause of action, that was not created by

the act of the decedent himself; and it is therefore singular, that the principle in its application to these convergent propositions, was not carried out.

In actions against the personal representative, on his own contracts and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*; and he is, by every principle of legal analogy, to answer it with his person and property. The pleadings, it is true, have not hitherto been molded to the new principle; nor could they be in the case of an acknowledgment by a personal representative, whose promise gives no action against him, unless it be sustained by some other consideration than the previous debt, which imposes no moral obligation to pay it out of his own pocket, especially, since he has been deprived of all color of title to the residue. Had the judges, when they determined that a promise to the representative of a decedent must be declared on as such, also determined that it must be declared on as such, when made by him, they would have restored the law to its primitive symmetry, and suggested a principle that would have entirely extinguished the notion of revival, which, for want of it, seems to have lingered in its embers through the succeeding cases; for the forms of the law are the indices and conservatories of its principles. It would not only have indicated the necessity of a special consideration, to support the promise of a representative, but it would have disclosed a bar to an action against two or more, on a promise by one. And as he can not charge himself personally without a new consideration, he can not charge the estate, on the foundation of the old one, to the prejudice of the creditors, whose fund might be materially lessened by it. He is not bound to plead the statute, because he may know the debt to be a just one; and for that reason only, the matter is left to his discretion; but it follows not, that he may tie up his hands from using it, when the time comes, by a mistaken concession, or an engagement which has no consideration to bind him personally or officially.

Besides, it would be hazardous to expose the estate to the consequences of his inexperience or ignorance of the demands made upon him. We know how perilous a thing it is for the debtor himself, though armed with knowledge and vigilant to guard against surprise, to converse about a debt barred by the statute; but the peril would be overwhelming, if the estate were to be jeopardized by the mistakes of one, who is bound to parley, and has not only everything to learn, but to learn it from those

whose interest it is to mislead him. Why, then, should we not finish what was so well begun in *Jones v. Moore*, by making the law of the subject consistent in all its parts, and giving to the statute entire effect, both in substance and in form? To do so, would involve no violation of that case as a precedent, for, as I have said, the point was not adjudged; and the step remaining to be taken in the progress of departure from the doctrine of revival, is no greater than was taken there. Indeed, there is no course open to us, but to follow the principle out, or abandon it altogether; for, to be consistent, we must either return to the doctrine of revival without qualification, or maintain that an action on his own promise, lies not against an executor or administrator in his official character. And for saying it does not, we have the authority of *Thompson v. Peters*, 12 Wheat. 565, and *Peck v. Botsford*, 7 Conn. 178 [18 Am. Dec. 92]; in both of which, the point was directly ruled. There was, therefore, nothing to leave to the jury; and the exclusion of the evidence, as well as the direction to find for the defendants, was entirely proper.

Judgment affirmed.

NEW PROMISE OR ACKNOWLEDGMENT BY THE ADMINISTRATOR of a debtor will take the case out of the statute of limitations: *Cobham v. Administrators*, 2 Am. Dec. 612. So a new promise by one of several executors: *Briggs v. Starke*, 12 Id. 659. But in *Peck v. Botsford*, 13 Id. 92, it was held that an acknowledgment by an executor of a decedent's debt barred by the statute of limitations, will not take the case out of the statute. That a new promise by an executor to pay his testator's debt, will not take it out of the operation of the statute, is held, following the authority of *Fritz v. Thomas*, in *Reynolds v. Hamilton*, 7 Watts, 421. So whether the promise is made before or after the statute has run: *Forney v. Benedict*, 5 Pa. St. 226; *Steel v. Steel*, 12 Id. 66. The principal case is recognized and approved as an authority on the same point in *Man v. Warner*, 4 Whart. 479; *Agnew v. Fetterman*, 4 Pa. St. 59; *Hull v. Boyd*, 6 Id. 270. But the administrator is not bound to plead the statute if he believes a debt to be justly due. It is within his discretion, and as trustee for the creditors and distributees he is bound merely to exercise good faith: *Ritter's appeal*, 23 Id. 96, citing *Fritz v. Thomas*. In *Reed v. Reed*, 46 Id. 242, the principal case is referred to as clearly exhibiting the doctrine that where a debt is barred by statute and a new promise is relied on, although the old debt is declared on, and the new promise given in evidence, the liability which the law enforces arises out of the new contract.

BAILEY v. KING.

[1 WHARTON, 113.]

ACTION FOR COMPENSATION FOR EXTRA WORK DONE BY AN APPRENTICE during his apprenticeship, for his master, can not be maintained against the latter, even though such work was done upon his express promise to pay for it.

ERROR to the court of common pleas of the city and county of Philadelphia, to remove the record of an action in which Robert King was plaintiff, and Lydia R. Bailey was defendant. The action was originally commenced before an alderman, who gave judgment for the plaintiff, from which the defendant appealed to the common pleas. The declaration was in assumpsit for work and labor done, and the defendant pleaded *non assumpsit*, and payment. On the trial it appeared that the plaintiff was an indentured apprentice of Mrs. Bailey, the defendant, to learn the art of printing; that the defendant had promised the plaintiff a certain sum per week, for all the work done by him beyond a certain amount, during his good behavior; and that she had withheld this promised remuneration on the ground that he had misbehaved. The judge charged the jury that an express promise by the master to pay his apprentice for extra service would be binding upon him, and that the apprentice might maintain an action for the breach of it. The plaintiff's counsel excepted to this charge, and having removed the record to this court, assigned for error, that the judge erred in stating to the jury that this action could be maintained against the defendant, she being the mistress, under an indenture of apprenticeship, of the plaintiff below.

Owens, for the plaintiff in error.

Hubbell, *contra*.

By Court, GIBSON, C. J. It is conceded that extra work by an apprentice, is not a consideration to raise an implied promise; but it is said to be sufficient to support an express one. But if the master be chargeable at all, why not on a common count, as in ordinary cases of work and labor done? It may perhaps be, that without an agreement to define the portion of the work which belongs to the master by force of the indentures, there could be no such thing as extra work. It is certain that an apprentice stands not on the ordinary footing of a servant; but for that very reason, it becomes a question of grave concern, whether the enforcement of such an agreement, by legal means, be not forbidden by considerations of policy. In many respects, the master is in the place of a parent. He is treated as such in the statutes to prevent the clandestine marriage of minors; and his relation to the apprentice, if not strictly parental, is at least pupillary. Now these promises are but incitements to industry, and those virtues which are ever found in its train. By the proofs in the cause, it appears that the conditions, by the ob-

servance of which the reward was to be gained, were not merely the performance of additional labor, but also regular attendance at church, and the keeping of regular hours at home—matters intended to benefit, not the mistress, for she was to pay for the increase of production, but the apprentice himself, in the preservation of his morals, and the improvement of his professional skill. Can it be that these observances may be made the foundation of a legal demand? Declare them to be subjects of judicial cognizance, and all inducements to propose them will cease. No schoolmaster, tutor, or disciplinarian, in whatever profession or pursuit, will recur to premiums for diligence, at the peril of a lawsuit. From the very nature of a premium, the proposer of it is to be the arbiter and awarder of it, where another is not designated. Will it be credited, that the defendant would have held out this salutary incentive to employment, during hours that might have otherwise been given to vicious indulgence, had she thought she was contracting a legal obligation? Had she done so, she would, at the same moment, have ceased to be the mistress of her shop. The case of *Mason v. The Ship Blaireau*, 2 Cranch, 270, is pressed upon us to show that the master has not a right to the extraordinary earnings of his apprentice; which, however, were explained there, to be such as are produced by his labor when not employed in his master's service. We have a very different case. Besides, the question had regard to the rights of the apprentice as regulated by the indentures, and not to the validity of a collateral promise, drawn into question by considerations of policy. We are entirely satisfied that, not only public expedience, but justice between the parties, forbids it to be made the foundation of an action.

Judgment reversed.

ROBINSON v. WOELPPER.

[1 WHARTON, 179.]

LEGACY DEVISED TO A WOMAN, BEFORE SHE WAS MARRIED, IS NOT ATTACHABLE for the debt of her husband; where, therefore, a deceased husband bequeathed to his wife the interest of a certain sum during her life, such interest is not liable to a foreign attachment, at the suit of a creditor of her second husband.

ERROR to the district court for the city and county of Philadelphia. Robinson had issued a foreign attachment against Othniel Colescott, and, after judgment, issued a *scire facias*

against George Woelpper, the garnishee. Upon the trial of this *sci. fa.*, the jury found a special verdict, setting forth: That Frederick Woelpper, the former husband of Rachel Cole-scott, now wife of Othniel Colescott, the defendant in the attachment, made his will, by which, among other bequests, he devised to his wife the one third part of the net interest and income accruing and arising from the remainder of his estate, for and during the full term of her natural life; that George Woelpper, the defendant, was appointed executor of the will, and, as such executor, had in his hands the sum of two hundred and forty-two dollars and seventeen cents, due to said Rachel Colescott under the provisions of said will. The court below, upon this verdict, rendered a judgment in favor of the defendant, whereupon the plaintiff removed the record to this court.

Wheeler, for the plaintiff in error.

Arundel, contra.

By Court, HUSTON, J. There is scarcely any part of the law, in which the distinctions have gone on nicer grounds, than in that which relates to the rights of husband and wife. Nay, the decisions are not always to be reconciled; and in more than one instance, what was held to be law at one time, has been subsequently expressly overruled. I shall confine my remarks to the case before us.

The cases cited do not, all of them, apply to the case before us. This is not the case of money earned by the labor of the wife, and sued for on the implied promise to pay; nor is it the case of money or goods devised to a married woman, or of a bond or note given to a married woman—it is a legacy devised to a woman before she was married. I may admit that the husband could sue for it alone—could release it—assign it; that it would go to the assignees of her husband, if a bankrupt, or insolvent debtor. Here he has not sued for it, nor released, nor assigned it, nor been declared a bankrupt, nor assigned and been discharged under the insolvent debtors' act.

The position, that if a husband can sue for it alone, and recover, it is his, and goes to his executor, and does not survive, is not admissible. He may assign a term for years—bring ejectment, and recover it in his own name. It may in his lifetime be taken on execution for his debt; and yet every book says, that if he does not assign it—does not bring an ejectment for it, in his own name, but leaves it not sued for, or joins his wife with him, as plaintiff, in the ejectment, or it is not

taken in execution for his debts, during his life, it survives to the wife; and he can not prevent this, by devising it; though he could have sold or assigned it till the last moment of his life. In England, legacies are recoverable generally in chancery, and this has introduced a part of their law, as to husband making provision for his wife, where the gift is to her, before he can recover the bequest; and on this subject, also, all the decisions are not easily reconciled. We may say that, generally, where he has made a settlement on her at the marriage, he gets legacies, claiming as a purchaser, without any new settlement on recovering the legacy. But this is not universally so. For where the sum settled at the marriage is small, and the legacy large, he has been compelled to settle a further sum. In this case, the husband has made no settlement; and his creditors can't claim on that account. But this chancery power has not been exercised in this state. It would seem, then, that although the right of the husband is in many cases absolute, yet, if he does not exercise the right, it expires with his life. He is entitled to the property, to the term for years, the chose in action or legacy; but he is entitled to it, and owns it, in right of his wife; and when he dies without having exercised his right, her right is superior to, and exclusive of all others. Husband and wife are, in law, but one person. All rights to personal property which were in her, by this legal fiction, are in him, as identified with her, during his life; and though he, having the power to sue or dispose, may recover, and reduce to possession or dispose of the chose in action without her, yet the right still remains in her so far, that if she survives, she has it precisely as she had it before marriage.

The act of the husband only, can divest this right of the wife. A creditor can imprison a man if he does not pay his debts, and has no property on which to levy it. But, although in prison, the creditor can not compel him to assign his own bonds, given directly to himself; nor the bonds or legacies given to his wife before her marriage: and I think no case or dictum can be found to show, that during his life, or after his death, the bond or legacy to the wife, before marriage, can be taken for his debt. If he wishes to be discharged from prison under acts for relief of insolvent debtors, he must assign them; and then, it is the act of assigning, which passes them to the creditors. The fact of his being indebted, and no other fund to pay creditors, will not pass them. The law seems to require

some act of the husband, to take them from the wife. If no act is done by the husband, the chose in action, which was the wife's before marriage, must be hers after his death. In this case, the husband has done no act: has not sold, released, or assigned—either voluntarily or as a bankrupt. The result of this may be, that a husband may have a right to money which he could get, but which his creditors can not reach. So a bond may be due to him, or a debt; his creditors can not levy on either of these; and if he will lie in jail, they can not obtain them during his life. A bond to himself, or a debt to himself, may, after his death, be reached by his creditors; but a legacy or debt to the wife, before her marriage, if not collected by the husband, his creditors can not obtain: for, as it was originally in the wife, and the husband's right arose from the fiction of the law, which, for many purposes, considers husband and wife but one person, the law remits to the wife her original right on the death of the husband; and neither the heirs nor creditors of the deceased husband have any right to it. The very point now before us, was decided by this court, in 2 Watts, 90;¹ for this yearly sum is the legacy. The bequest is not of the principal to the wife, and the interest annually. If it were so, I am not aware that it would make any difference. If a bond is due to a woman before marriage, and neither principal nor interest disposed of by the husband during life, the whole, on his death, goes to the wife. So of a legacy bearing interest.

Whether any legacy can be attached for the debt of the legatee, has not yet been decided in this state, and we say nothing about it.

Judgment affirmed.

WIFE'S CHATTELS AND CHOSSES IN ACTION, HUSBAND'S INTEREST IN.—Articles of apparel and ornament belonging to a wife before her marriage, excepting necessary wearing apparel, are liable to attachment for her husband's debts: *Hanlon v. Thayer*, 1 Am. Dec. 1. Choses in action belonging to a woman before marriage, or acquired during coverture, unless reduced to possession by the husband in his life-time, survive to the wife upon his death; and if he survive her, he is entitled to them, under the statute of distributions: *Miller v. Miller*, 19 Id. 59. But it is held in *Van Epps v. Van Deusen*, 25 Id. 516, that a wife's personal estate in action, unless secured to her as her separate property, passes to her husband's assignee in insolvency, subject, however, to her right by survivorship in case her husband dies in her life-time and before the assignee has reduced the property to possession. In *Skinner's appeal*, 5 Pa. St. 262, it is decided, on the contrary, citing the principal case, that a legacy to a wife will not pass to her husband's assignee for the benefit of creditors, by an assignment of all his "personal property, of

1. *Dennison v. Nigh*.

any kind whatever, which he holds, or is in any manner entitled to, be the same in possession or action." The reason given was, that the language of the assignment applied only to his personal property, and that he had no property in such a legacy. It was conceded that the case would have been different if the legacy had been expressly included.

In *Timbers v. Katz*, 6 Watts & S. 299, and *Mellinger's Adm'r v. Bausman's Trustee*, 45 Pa. St. 528, the principal case is cited as an authority for the doctrine, that before the husband has reduced his wife's choses in action to possession, or has manifested his intention to exercise his marital dominion over them, they can not be attached for his debt. In *Ellmaker v. Bank of United States*, 6 Penn. L. J. 97, it was determined, on this principle, that bank stock transferred to a wife in her own name, after marriage, was a chose in action, and not liable to be taken for her husband's debt by process of foreign attachment. A husband may acquire an absolute property in a legacy given to his wife, or other chose in action belonging to her, by the intentional exercise of acts of ownership over it, even where a previous life estate is given to another in the same property which is the subject of the legacy: *Woelpper's appeal*, 2 Pa. St. 71. An intention to make the property his own is necessary, and reduction to possession is simply evidence of that intention, which may be rebutted by showing that he took possession as administrator, and not in the exercise of his marital right: *Gochenaux's estate*, 28 Id. 463. It is well settled in Pennsylvania, that although a husband can not give away his wife's choses in action, nor pledge them as collateral security, so as to bar her right of survivorship, he may sell and assign them for a valuable consideration; and this applies not only to choses in action presently reducible to possession, but also to reversionary interest or possibilities: *Webb's appeal*, 21 Id. 248.

BURR v. SIM.

[1 WHARTON, 252.]

EQUITY CONSIDERS AS MONEY, LANDS DIRECTED IN A WILL TO BE SOLD and converted into money; and where a testator directs his executors to sell all his real and personal property, and pay over the proceeds to his son's guardians, whom he directs to use the interest for the support and education of his son, and to pay to him the principal on his attaining his majority, such realty will be considered as having been, by the directions of the will, converted into money, although it was never sold by the executors.

SAID SON MAY, ON ATTAINING HIS MAJORITY, ELECT to treat the real estate unsold as land, and the fact that he thereafter devises it as such, is proof of his determination so to reconvert it.

BY MAKING SUCH ELECTION, HE TAKES AS A PURCHASER, and not by inheritance, and any portion of such estate undisposed of by him goes, under the act of 1794, to his heirs on the maternal as well as to those on the paternal side.

DEVISE OF SUCH REAL ESTATE BY HIM, WITHOUT WORDS OF INHERITANCE, passes a life estate only.

ERROR to the district court for the city and county of Phila-

delphia, to remove the record of an action of ejectment to recover possession of a house and lot of ground in the city of Philadelphia. The plaintiffs below (defendants here) claimed as heirs of Archibald C. Craig, who died seised of the premises in 1797. His title accrued under his father's will, dated in 1782. By this will the testator directed that his executors should sell all his real and personal estate remaining after payment of debts and legacies therein bequeathed, and pay over to two persons therein appointed guardians of his son A. C. Craig, the whole of the proceeds. The interest on this sum was to be used by the guardians for the support and education of said son, and the principal was to be paid to him upon his attaining his majority. The houses were directed to be rented until sold as directed in the will. The executors never sold the premises in question, and were both dead at the commencement of this action. A. C. Craig attained the age of twenty-one years some time in 1796, and died in 1797, leaving a will, made by him while absent from home, in the state of New Jersey, and on the day on which he died, in the following words:

"In the name of God, Amen. I, Archd. Cumiss Craig, feel myself in a declining state of body, and knowing the certainty of death, and not knowing the time thereof, the funds in Eng.

"My funds I have in the bank of England I wold wish to devise unto John Creigh, son of Archb. Cregg of Eegin county of Murough, in the kingdom of Scotland, and unto Mr. Anderson, son in law unto the aforesaid Archibald Craig an inhabitant of Scotland, to be equal dd. between the of sd. Jo. Creg. and sd. Mr. Anderson.

"Likewise I wold give unto my loving frnd Joseph Louriat of the city of Philadelphia six hundred dollars.

"Further I wish to give unto Mesrgs. Martha Ross wife of Capt. David Ross, of the city of Philadelphia, or to her heirs or assigns, one three story brick house in Arch street, No. 63.

"Further I wish to give unto Doct. William Curry, of the city of Philada., one other 3 story house in Arch stt, No. 65."

The house in Arch street last mentioned was the property in dispute in this action.

Henry Disborough, one of the witnesses on the probate of the will, testified that the writing above set forth was written in part by the deceased and in part by himself at the request of

the decease; that it was read to the said A. C. Craig, and by him acknowledged to be according to his wishes; and that he believed the deceased was, at the time, of sound and disposing mind and memory. He further testified that he asked the deceased as to the further disposition of his estate, to which he replied, that as to the bequests already set down, he had made up his mind upon them for some time past, but as to further bequests he had not fully made up his mind upon them, and must take some time to think upon the subject; that witness then left the room for some time, and upon his return found the deceased, as he thought, incapable of proceeding any further on business. Archibald C. Craig died unmarried and without issue. Dr. William Currie, the devisee above named, died intestate, leaving two children as his heirs. The defendant, Postrema Burr, came into possession during Dr. Currie's life-time, as his tenant, and the other defendant was admitted to defend as the landlord of the defendant.

The judge charged the jury as follows: 1. That Dr. William Currie took only a life estate in the premises under the will of Archibald C. Craig. 2. That the real estate directed by the will of George Craig, the father of A. C. Craig, was not converted into personal estate, nor as such did it vest in A. C. Craig, nor did the property in dispute pass by the will of A. C. Craig to Dr. Currie as personal property. 3. That the said premises came to A. C. Craig by descent from his father, and upon his death, descended, subject to the life estate of Dr. Currie, to his next of kin on the part of his father. 4. That no interest in these premises ever vested in the next of kin of said A. C. Craig, on the part of his mother. 5. That the plaintiffs are entitled to the whole of the lot in Arch street. The defendants took a writ of error, and assigned as error the foregoing charge of the judge.

Wharton, for the heirs of Dr. Currie.

Read, for the heirs *ex parte materna*.

Scott and Bradford, for the heirs *ex parte paterna*.

By Court, ROGERS, J. (after stating facts, and the principal clauses in the wills of George Craig and Archibald Cummings Craig). It is contended: 1. That by the will of George Craig, the house and lot devised to Dr. Currie, which is the subject of the ejectment, was converted into personal property. 2. That whether personal or real, Doctor Currie took an absolute interest in the estate. 3. That if the real

estate was, by the will of George Craig, converted into personalty, yet, Archibald Cummings Craig elected to take it as real estate after he attained full age: that as such, it was a new acquisition in his hands, and descended to the heirs, *ex parte paterna* as well as *materna*.

Under the three questions as above stated, it is believed, that all the points which have been so ably and elaborately discussed at the bar, may be considered.

There are certain principles which enter into the solution of the first proposition, that do not, at this day, admit of dispute. Thus equity considers lands directed in wills or other instruments to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land. The doctrine of conversion, as it is called, is founded on the equity maxim, that what is properly and sufficiently directed to be done, is in equity, considered as done. By virtue of it, one may impress upon his money the character of land, and upon his land, that of money, in so effectual a manner, that the property will thereafter, in a court of chancery, be treated as of the description into which it is directed to be changed. The question of conversion is determined according to the intention of the testator, which if it be not expressly mentioned, must of course be derived from the general effect of the will.

The general intention of George Craig to convert his real estate into money is, we think, very plain. If we are at liberty to speculate as to the reasons which governed him in the disposition of his property, it would seem to have arisen from an impression that money would be better for his son than land, an impression probably derived from the difficulty and losses he had experienced in the management of his real estate. The testator has blended his real and personal property into one common fund; and has throughout spoken of it and treated it as money, and as such, has directed it, in express terms, to be paid over to his son, when he arrived at the age of twenty-one years.

It is said, that if the purposes of the will be specific, as to pay the testator's debts, legacies, or other charges, the property beyond what is sufficient to satisfy the same, will be held to remain in its original estate; and if they should wholly or partially fail, the property will be regarded, as if no conversion or only a partial conversion thereof had been made. The heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid; and he may come into a

court of equity, and restrain the trustee from selling more than is necessary to pay the debts and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land and not money. This is undoubtedly true, but the counsel have failed in pointing out such specific purposes in the will. The payment of debts and legacies was not the moving cause, for they might have been paid out of the personal estate, which is the primary fund for that purpose; nor is there any ground to believe, that the object he designed to effect, was to devise a mode of providing for his alien relatives, who resided in Scotland, as this might have been done equally well in other ways. But, even if these were some of the reasons which influenced him, there is no ground for supposing that they were the only or the principal ones. By the will, he gives his property to his son, when he attains the age of twenty-one years, and directs the money arising from the sale of the real estate, as well as the personal, to be paid over to the guardians for his benefit during his minority, and the money, when he attains age, to be paid to himself by his guardians. Even, in the case of resulting trusts for the benefit of the heir at law, it is settled, that if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated and the estate is to be considered to be personal: *Craig v. Leslie*, 3 Wheat. 583; *Yates v. Compton*, 2 P. Wms. 308.

This case comes within another principle. Where the property devised is real, and directed to be divided for the general purposes of the will, as for instance, to form with the personalty a common fund, for all the purposes of the will, although it should happen, that some of them fail, it will be considered an absolute conversion. The new character is definitively and imperatively fixed upon the property, or in more technical words, it is said to be converted out and out.

But, whether the property be personal or real, it is said Doctor Currie took the whole interest. If this be true, it defeats the plaintiff's title. The observations which have been already made, might seem to dispense with any opinion on the construction of the will, on the supposition, that the house and lot was real property, but, although this may be so, yet on that point we think it right to express an opinion. This

point arises on the clause of the will of Archibald Cummings Craig: "Further, I wish to give unto Doctor Wilm. Curry, of the city of Philada., one other three story house in Arch stt, No. 65."

It is contended that there are no words of limitation in this clause, which will carry a fee; still it is said, that such intention may be collected from the whole will.

In aid of this part of the case the counsel wish the court to supply certain words in the introductory part of the will, and in the devising clause. Words may be transposed, supplied, and changed in accordance with the context. But this can not be done on conjecture; there must be something in the will, from which there may be a reasonable implication, that by the construction you carry into effect the testator's intent: Pow. D. 371, in note. We are requested to supply the words declarative of intention to dispose of all his estate. But, even if we felt ourselves at liberty to do so, I do not see how this would help their case; for although the introduction of a will declaring that a man means to make a disposition of all his worldly estate or worldly goods, is a strong circumstance connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee, when he has used no words of limitation, it will not do alone: *Ferris and wife v. Smith et al.*, 17 Johns. 221; *Loveacres v. Blight*, Cowp. 356.

We are desired however to add words of limitation to the devising clause, but for this we perceive no warrant in the will. It is impossible for us to tell, if he had carried out his intention further, what disposition he would have made of the fee. He might have limited it in tail, or have given the remainder or reversion to some person, other than the devisee. A witness, Henry Disbrow, says, that he asked the deceased as to the further disposition of his estate, to which he replied, that as to the bequests already set down, he had made up his mind upon them, for some time past, but as to further bequests he had not made up his mind, and must take some further time to think upon the subject; upon which the deponent left the room for some time, and upon his return found the deceased, as he thought, incapable of proceeding any further in the business.

It is again said, the word, further, is to be used in connection with the preceding clause, in which a fee is given to the devisee therein named in apt words. But the defendant can not derive any benefit from this source, because it is an entirely distinct sentence from the preceding. It needs no reference to it to

give it meaning and effect; it is perfectly intelligible, standing by itself; and because the devisees are to different persons. The terms "item," "further," "moreover," are commonly used in the beginning of a new devise or bequest, without indicating any particular intention in the disposition of the property: 4 Rawle, 66.¹ The cases where this word, or words of similar import, have enlarged the estate into a fee, are such as in *Neide v. Neide*, Id. 75, which was this: Testator devised as follows—Principally and first of all, I give and bequeath to my eldest son, J. N., my late purchase from E. C., as also four acres of woodland in a corner, etc. The land purchased from E. C. was purchased in fee simple, and it was held, that a fee passed to the devisee, both in the land purchased from E. C., and in the four acres of woodland. This court were of opinion that the words, my late purchase, indicated an intention to give a fee; that there was a necessary connection between the two pieces of property; that in fact, the latter would be entirely inoperative without reference to the former, and that as it was to the same person, it carried a fee in the four acres of woodland.

Taking then, this to be the case of a sale and conversion of land into money, according to the principles before stated, it follows that it remains so, unless there has been an election to take it as land. Land once impressed with the character of money, must remain so impressed, until some person elects to take it in its original character as land; and this leads to the question, whether the devisee, Archibald Cummings Craig, so elected to consider it. It must be observed, that nothing which took place during the minority of Archibald Cummings Craig, can make any difference in the result, for an infant can not by any act of his, change the property: nor can his guardians; nor is the fact that the property remained unsold until the devisee arrived at full age, entitled to any weight whatever in the decision of this question. It also seems to me to be the better opinion, that taking the estate, and holding it one year after he attained his age, would not of itself be an election, although entitled to some weight. It is certain, that the devisee may take it himself in the shape of land or money; but when there has been a conversion in the contemplation of the court, the *onus* of showing that the property ought to pass under a different denomination, by proving an act in the donee, indicating his intention to that effect, lies on the party who claims it in its original estate. It is therefore incumbent on the defendant,

1. *Evans v. Knorr*.

who claims the property as land, to show that Archibald Cummings Craig elected so to consider it; and this the will itself sufficiently shows. It is devised by the testator, as real estate; and I suppose it never entered his mind, when he took possession of the property, to hold it in any other character. And this argument derives strength from the preceding clause, where the testator devises the other house which he held by the same devise, in the language peculiarly appropriate to the limitation of a fee simple in real estate. It must also be observed, that the testator in his bequests of his personal funds, omits words of inheritance; which would seem to show that however little he may have been benefited by his education, he was aware of the difference in the nature of estates real and personal.

If then, at the death of Archibald C. Craig, the property in dispute is to be treated as real estate, is it to be regarded as a new acquisition by him, or must it be taken as property which descended to him from his father, or was it devised to him as real estate by his father; and did it under the act of 1794, pass to his heirs, on the part of his mother, as well as to the heirs on the part of his father?

The plaintiff's counsel contend, that the power to sell is a naked power, and that until the execution of the power, the land descends to the heir, who at common law, would be entitled to the profits. As a consequence of this doctrine, it is insisted that the descent is not broken, but that Archibald C. Craig took the legal estate, and that in electing to take the property as land, he is in by descent, the equitable following the nature of the legal estate. But we do not view the authority as of this description: we think it clear that the authority to the executors is coupled with a trust and an interest. I accede to the principle that a power of sale does not of itself give the legal estate, and that where a man directs his executors to sell, the land descends until sale to the heir at law; and he may enter and enjoy the rents, issues, and profits, for his own use. A devise of land to executors to sell, passes the interest in it, but a devise that executors shall sell the land, or that land shall be sold by the executors, gives them but a power. Whether the descent is broken by a naked power, it is unnecessary to decide, nor since the act of the thirty-first March, 1792, is the question a point of much importance in Pennsylvania. However it may be as to a naked power, there can be no doubt, that in the case of a power coupled with an interest,

as we think this to be, the descent is broken. In considering the extent of a power, the intention of the parties must be the guide: Sug. on Pow. 459. A reference to the terms of the will, is the only course by which to determine whether a naked power only is intended to be given; for even if the terms made use of in creating the power, detached from the other parts of the will, confer merely a naked power to sell, yet if the other provisions of the will evince a design that at all events, the lands are to be sold, in order to satisfy the whole intent of the will, it is not a naked power, but is coupled with a trust and an interest: *Franklin v. Osgood*, 14 Johns. 527; 2 P. Wms. 311.¹

Here it is necessary that the land should be sold to satisfy the whole intent of the will, as it is plain that he has directed the whole estate to be turned into personalty, under an impression as we suppose, that was the best disposition of his estate for the benefit of his only son and heir. The testator not only authorizes, but he directs his executors to sell; and by a necessary implication from the will they are authorized and directed to rent the houses devised, until they shall be sold according to the directions of the will. The character of such a power does not depend upon the quantity of interest given, for a trustee invested only with the use and profits of the land for the benefit of another, has an interest connected with his power; and it has been held, that an authority to lease is sufficient to exempt a power from the character of a mere naked authority to a stranger: 2 Johns. Ch. 29.² This is a devise to the son, who is at the same time the heir of the testator; but supposing that they were not one, what authority would an heir have to enter on the land, and take the profits? It would defeat the whole intention of the will. The executors must have an interest to carry into effect the general purposes of the testator. It results as a necessary implication from the whole will, that this is not as is contended, a mere naked power to the executors, but that it is an authority, coupled with a trust and interest, and as such that the descent is broken. But did this property in legal contemplation as land, come to the devisee from his father? We think it did not. It came to him impressed with the character of money. It was by an act of his own that it was reconverted into land. The very act of election implies a choice between the two species of property, and effects a change in the nature of the property itself. If the property had been sold by the executors in pursuance of the directions of the will,

1. *Yates v. Compton*.

2. *Osgood v. Franklin*; 8. C., 7 Am. Dec. 512.

and the devisee had become the purchaser, as he might, there can be no doubt that it must be viewed in the light of a new acquisition. Where then can be the difference, when by an act of his own he elects to consider that as land, which otherwise has the impress fixed upon it as money? It is a purchase of it as land, by a surrender of the right which he undoubtedly had to consider it as money. And there is no hardship in this to the relations *ex parte paterna*; for if no election had been made, the property would have gone to his relations in equal degree, without regard to the source from whence the property was derived. And this seems to have been the opinion of the court in *Allison v. Wilson*, 13 Serg. & R. 330.

Judgment reversed, and a *venire de novo* awarded.

Cited in *Smith v. Starr*, 3 Whart. 65; in *Commonwealth v. Torrey*, 3 Watts & S. 357; and in *Stuck v. Mackey*, 4 Id. 197, to the point that where the proceeds of real estate are devised, the devisee may elect to take the fund either as land or as money; in *Parkinson's appeal*, 32 Pa. St. 458, to the point that land devised to be converted into money is regarded as money; in *Neely v. Grantham*, 58 Id. 443; in *Meily v. Wood*, 71 Id. 493; and in *Foster's appeal*, 74 Id. 399, to the point that an election to take land, as land, is a new acquisition of title; in *Opdyke's appeal*, 49 Id. 379, to the point that a taking by devise is a purchase, and not a taking by descent; in *Simpson v. Kelso*, 8 Watts, 252, to two points: 1. That land directed by a will to be sold and converted into money, is to be considered as a devise of money; 2. That an election on the part of the devisee operates as a new acquisition; and in *Miller v. Meetch*, 8 Pa. St. 425, to the point that an authority to lease is sufficient to redeem a power from the character of a mere naked authority to a stranger. This case was again brought up on another point, and is reported in 4 Whart. 150.

KIRKHAM v. SHARP.

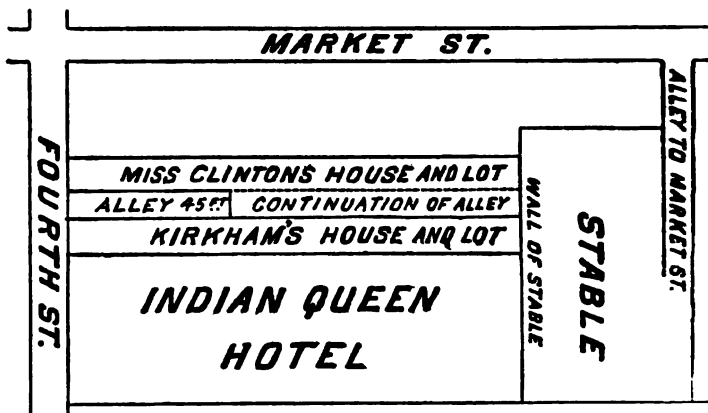
[1 WHARTON, 323.]

UNGRANTED RESIDUE OF A RIGHT OF WAY MAY BE ANNEXED to a particular message or close, either by express stipulation or necessary implication, according to the occasion of the grant.

GRANTOR OF SUCH RIGHT OF WAY, BY CONVEYING FULL PRIVILEGE of ingress, egress, and regress, puts his right thereto exactly on a footing with that of his grantee as a co-tenant; and therefore he can not afterwards use his ungranted residue in a manner different from that contemplated and obviously intended by the parties at the time the grant was made.

ACTION on the case, brought in this court by William Kirkham against John Sharp, jun., and submitted upon an agreed case stated for the opinion of the court. The following diagram

will sufficiently explain the references in the statement, and in the opinion.



In 1767, Anthony Morris and wife granted to John Litle and his heirs a large lot of ground on the east side of Fourth street, between Market and Chesnut streets in the city of Philadelphia, the position of which is sufficiently shown by the above diagram.

In 1792, said Litle and wife conveyed to Robert Smock and his heirs a part of the above-mentioned lot, marked on the diagram as Kirkham's house and lot, viz.: "A lot on the east side of Fourth street, between High and Chesnut streets, containing in front, on Fourth street, twenty-five feet, and in depth about one hundred feet, more or less. Bounded east by a brick stable, standing in line of the lot; south, by Litle's other ground; west, by Fourth street; and north, by ground now or late of Litle. Together also with the full and free privilege and authority of ingress, egress, and regress, by, through, and upon a four feet and six inches alley, extending in and about forty-five feet from Fourth street, to be forever left open between the lot hereby granted and the house now occupied by Miss Clinton; also, with the full and free privilege of the use of the pump of water, being in the yard of the aforesaid house, and about on the line between the two lots." The deed contained a covenant on the part of the grantee to build a good three story brick house on the lot within five years. The premises thus conveyed to Smock are now the property of the plaintiff, who holds them under Smock by a chain of conveyances. Smock, in 1793, erected on this lot the three-story brick building known as No 7 South Fourth street, with two-story back buildings

running back to the stable wall mentioned in the deed, and shown in the diagram. In 1827, the administrator of John Little conveyed to Sharp, the defendant, all the lot conveyed by Morris to Little, except the lot conveyed by the latter to Smock, as above mentioned. This deed conveyed the premises, subject to the right of way mentioned in the deed, to Smock, above referred to, and "to all the covenants made by the said John Little to the said Robert Smock." Since October, 1828, the defendant has passed on foot and led a horse, without the leave of the plaintiff, through the four-and-a-half foot alley, and on through a continuation thereof, indicated on the diagram by a dotted line, to and through the stable wall, through which he made an opening into the stable. The question submitted to the court is, whether, in point of law, the defendant has, by reason of the premises, interfered with or obstructed the said alley, or the use or enjoyment thereof, by the plaintiff, as he was entitled to use and enjoy the same.

Gadwalader and Chauncey, for the plaintiff.

Read and Bouvier, for the defendant.

By Court, GIBSON C. J. The sum of the few authorities which bear on the point before us, is given in Cruise's Digest, tit. 24, sec. 15, where it is said that the use of a way must be according to the grant or the occasion of it, and not exceed it: so that a right of way over another's ground to a particular place will not justify the use of it to go beyond that place. For this is cited *Howel v. King*, 1 Mod. 190, and *Lawton v. Ward*, 1 Ld. Raym. 75, which bear a considerable resemblance to the present case. In the former of them, A., having a right of way over B.'s ground to Blackacre, drove his cattle not only to Blackacre, but to a place beyond it; and it was argued, that when they were at Blackacre he might drive them whither he would. On the other side it was urged, that if such were the law, A. might purchase any indefinite number of acres adjoining Blackacre, by which the grantor of the way might be entirely deprived of the benefit of his land; and that as prescription presupposes a grant, it ought to be continued according to the intent of its original creation; to which the court assented, and gave judgment accordingly. Were the defendant the grantee of an easement, this principle would be decisive of our case; but he is the owner of the soil subject to an easement granted by his predecessor to the other side, and consequently, the owner of all the ground, over which he passes

in going from the street to the termination in dispute; and the difficulty is to understand how an injury is done to the grantee by any use of the grantor's own soil, which is not an actual disturbance of the easement. I have found no authority for what struck me, in the course of the argument, as being a tenable position, that the grant of a way passes the whole use of it, except where a right of participation by the grantor is reserved in terms; nor do I mean to intimate, that the law would be so held, were the question now to be decided. For myself, however, I may remark, that agreeably to the rule which requires a grant to be interpreted most beneficially for the grantee, a strong argument might be made for the affirmative, inasmuch as exclusive enjoyment is more beneficial than mere participation, especially in a way which the grantee is to repair.

In the absence of special provision in the grant, questions of this sort must, perhaps, depend on the nature of the way and the degree of possession necessary to its enjoyment. But, not to insist on that, it is certain that the ungranted residue of a right of way may be annexed to a particular messuage or close, either by express stipulation or necessary implication, according to the occasion of the grant. An instance of this might be found in the disposal of houses surrounding a court, originally destined to be a common avenue to them, in which it would be sufficiently obvious from the disposition of the property, that the right of way had been appended to the houses and not to the owner of them. By the act of laying out the ground as a court, it would be allotted to the houses intended to adjoin it, so as to pass with them as an appurtenance; and the right of the owner would be correspondingly qualified by the nature of the use to which it was dedicated. Sales of the houses would successively abridge it, till it were ultimately extinguished along with his property in the last of them, when the purchasers might, by common consent, bar the entrance against his person, notwithstanding his legal title, just as they might bar it against a stranger. During his ownership of but a part of the property, he would be entitled to no privilege that he had not originally annexed to it; nor could his right to use the court as a thoroughfare to a messuage or close adjoining him on the further side, be greater than that of any of his grantees. Is not that the case before us? The plaintiff and the defendant derive their titles respectively from the owner of a larger lot, of which the premises were parcel; on the one extremity of which stood the Indian Queen tavern with its appendances, and

on the other a house in the tenure of a Miss Clinton. This house was a distinct tenement, and bounded in the rear by the stable wall of the tavern. Of the ground between the house and the tavern, Smock from whom the plaintiff derives his title, purchased a part for the site of a house, bounded in the rear also by the stable wall, and on the side next to Miss Clinton's house, by a line passing at a certain distance from it to the street, the intervening space, to the depth of the front building, being left open for an alley to be used in common. No part of the stable adjoined the alley, the entrance to it being from another street, and in the rear of the whole.

In this state of the premises Smock built the house owned by the plaintiff; and we have, therefore, two houses on an alley as the common easement of both, which was ostensibly designed in its creation to be subservient to no other part of the property; for the blind wall of the stable, which was a durable structure, would indicate to the eye of a purchaser, that it was designed for a permanent barrier against admittance on that side; so that in every material respect, the case corresponds to that of the houses on a court. It is plain, therefore, that to make the alley an appurtenance to what it was not at the time of the purchase, would be a fraud upon the contract. The intent of the parties is observable, however, not merely in the condition of the premises, as the basis of the agreement, but in the terms of the conveyance. Smock was to have the full and free privilege of ingress, egress, and regress; to which end, the alley was to be perpetually open between the lot granted and the house reserved. This shows to a reasonable intent, that the enjoyment of the alley was to be by the tenants of the premises particularly named; that the grantor, though owner of the soil, reserved no right to the alley, but what was incident to the ownership of his house; and that in this respect he put his right exactly on a footing with that of his grantee as a co-tenant. If so, the principle of *Howel v. King* and *Lawton v. Ward* is applicable to it with decisive effect.

But again, not to insist on the word "free," which was held in *Smith v. Kemp*, 2 Salk. 637, to pass an exclusive right of fishery, the word "full" was evidently designed to signify not only a community, but an equality of enjoyment, both in the manner and the measure of it; consequently, if the defendant might use the alley as a way to his stable, by breaking through the wall, so might the plaintiff use it in subservience to any adjoining close, which it might happen that he could approach

from the termination of the alley over his own ground; and the principle indicated in the two cases cited is, therefore, equally applicable to both. But the plaintiff's enjoyment, so far from being full in any sense of the word, would be actually hindered, if his servants or children were exposed to the danger of being trampled upon by horses, or annoyed by the transportation of ordure. These would present an actual impediment to the free use of the alley secured to him by the conveyance. Having regard, then, either to the nature of the occasion or the terms of the grant, it seems clear, that the alley was devoted to the ordinary purposes of the houses; and that the defendant could not lawfully pass with his horses through it, or use it as a common footway to his stable.

Judgment for plaintiff generally.

Cited in *Bird v. Smith*, 8 Watts, 440, to the point that in the case of a grant of a right of way, the right is not necessarily exclusive; in *Jamison v. McCreedy*, 5 Watts & S. 140, to the point that the use of a privilege can not be extended beyond the objects originally contemplated by the parties; in *Commonwealth v. Wood*, 10 Pa. St. 97, to the point that when the owner of land, to which the right of an alley is appurtenant, purchases adjoining ground, he can not extend this right of way to the recently purchased land; in *Shroder v. Brenneman*, 23 Id. 351, to the point that a man having a right of way over another's land to a particular close, can not enlarge or extend it to other closes; in *Kieffer v. Imhoff*, 26 Id. 44, to the point that a grant should be construed against the grantor so far as to pass the privileges affixed by himself to the property conveyed; in *Pa. R. R. Co. v. Jones*, 50 Id. 424, to the point that a permanent road established by the owner over his property, necessary for its convenient use, will not be destroyed by his sale; in *Dela-ware & H. C. Co. v. Torrey*, 33 Id. 149, to the point that an injury to a right is actionable, although the damage be inappreciable; in *Philadelphia & T. R. R. Co.*, 4 Whart. 45, to the point that the legal title to the ground over which a street passes, remains in the person who owned it before the street was opened; and distinguished in *Williams v. Estling*, 4 Pa. St. 487.

EASEMENTS ARE ATTACHED TO THE ESTATE, and not to the person: *Hills v. Miller*, 24 Am. Dec. 218, note 222.

CHANCERY CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

WELSH v. USHER.

[3 HILL CH. 167.]

A CONVEYANCE BY AN AGENT, in the style of "I, A. B., attorney in fact of C. D., do grant," etc., and signed "A. B., agent of C. D.," is insufficient at law to pass the principal's title.

A DEFECTIVE CONVEYANCE WILL, IN EQUITY, BE EXECUTED as an agreement for a conveyance, in order to effectuate the intention of the parties; therefore, a conveyance by an agent nugatory because professing to pass the title from himself, will, where there was ample authority in the agent to bind his principal, had the conveyance been in proper form, be executed in equity as an agreement of the principal.

AN EQUITABLE MORTGAGE IS CREATED by an indorsement at the time of her sale, on a ship's register, which is thereupon retained by the vendor, that the vessel shall not be sold until the notes given for her purchase money have been paid.

IDEM.—SUCH EQUITABLE MORTGAGE will be enforced against creditors who obtain subsequent legal lien, as by attachment, but not as against subsequent purchasers for value, without notice.

BILL in equity praying that the indorsement hereinafter set forth be decreed a mortgage; that Patrick Usher be decreed to perfect plaintiff's title to the Junietta, and for an injunction against said Usher's attaching creditors. The indorsement referred to was one made across the register of the brig Junietta, at the time of its sale by plaintiff to Patrick Usher, to the effect that the vessel should not be sold, until its purchase money had been paid. Later, a conveyance of the vessel to plaintiff by Wm. A. Usher, agent of Patrick Usher, was made in the manner stated in the opinion. The vessel having been attached afterwards by creditors of Patrick Usher, plaintiff in-

terposed his claims at law, where they were rejected. This bill was thereupon brought.

Hunt and Thomson, for the plaintiff.

Petigru and Dunkin, contra.

HARPER, J. I am of opinion, that the deed executed by William Usher, though it could not, as has been decided, operate at law as the conveyance of Patrick Usher, must be executed in equity as the agreement of Patrick Usher; certainly it is such an one as the court would execute as against Patrick Usher himself, and his legal representatives. This is not a reforming of the instrument, but goes on the familiar equity principle, that when property is attempted to be transferred by deed, and there are circumstances to prevent its operating as a conveyance, equity will give it effect as an agreement; as in the case of *Colman v. Sarrell*, 1 Ves. jun. 50; 3 Bro. C. C. 12,¹ where bank stock, which could only be transferred legally on the books of the bank, was attempted to be by deed; there is no question but that the court would have executed it as an agreement if there had been a sufficient consideration; and in *Wadsworth v. Wendell*, 5 Johns. Ch. 224, where land was attempted to be conveyed by an instrument having in other respects the form of a conveyance, but in consequence of "mistake or ignorance," as the chancellor expresses it, without a seal. The rule is laid down generally in *Morse v. Faulkner*, 1 Anst. 11, that an agreement to convey, or a deficient conveyance, will bind the lands in the hands of the grantor or his heirs.

Now, there is no doubt that William Usher had authority to convey this vessel. He attempted to convey by deed, but, by mistake or ignorance, executed the deed in his own name. If an agent contracts in his own name, without disclosing his principal, the general rule of law is, that the principal, if afterwards discovered, is liable on that contract: *Waring v. Favenck*, 1 Camp N. P. 85; *Rymer v. Suwercrapp*,² Id. 109; *Railton v. Hodgson*, 4 Taunt. 576. If William Usher, therefore, had only agreed to convey in his own name, and without reference to his principal, it follows that the principal would have been bound; but he does refer to his principal. The terms of the deed are: "I, William Usher, junior, attorney in fact, of Patrick Usher, owner of the brig Junietta," etc. From a technical legal principle, and from the manner in which the deed is signed, this can not operate as a conveyance at law;

1. S. C.

2. *Kymer v. Suwercrapp*.

but can there be any doubt as to what was meant? And what is there to prevent equity giving effect to that intention? The words "attorney in fact of Patrick Usher," are regarded at law as terms of description and surplusage; and when an executor sells the goods of his testator, and takes a bond payable to himself, as executor, at law this is regarded as his personal debt, and the term "executor" as a word of description. But is there any doubt that in equity this signifies the trust, and that the bond will be regarded as assets of the estate? I can not conceive a case in which equity ought to aid a defective conveyance, if not in this.

I think, also, with the deference which I always feel towards the judgment of the chancellor who pronounced the decree, that the indorsement on the ship's register constituted an equitable mortgage, and gave an equitable lien. Lord Hardwicke, in *Louthall v. Tonkins*, 2 Eq. Cas. Abr. 381, explains what is meant by goods being bound by an execution; that is, he described the lien of an execution, "that, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." To say, then, that the vendee shall not have power to sell, is in terms to say that the vendor shall have a lien. This could not operate as a mortgage at law, because it did not change the property; and it would therefore be regarded as nothing else than a personal contract; but so to regard it in equity, would be to render it absolutely nugatory and unmeaning. The vendor had already all the security that the personal liability of the vendee could give him. This construction is aided by the circumstance of the vessel's register being left in Welsh's possession. I need not refer to the cases in which the deposit of title deeds is held to constitute an equitable mortgage, to which this seems very analogous.

This equity, though existing, could not prevail against a subsequent purchaser for valuable consideration, without notice. The only matter on which it struck me there might be a doubt, was, whether it could prevail against creditors who had subsequently obtained legal liens. But a reference to authorities puts this out of question. In *Burgh v. Francis*, referred to in *Taylor v. Wheeler*, 2 Vern. 564, the defect of livery in making a mortgage, was supplied against judgment creditors. In *Finch v. The Earl of Winchelsea*, 1 P. Wms. 277, it was held that an agreement to convey, on adequate consideration, would be good against a subsequent judgment. In *Burn v. Burn*, 3 Ves. 582, the case of Sir Simeon Stuart is referred to, in which an incom-

plete agreement to mortgage was made good against a judgment.

To the same effect were our own decisions, in *Read v. Simmons*, 2 Eq. 554, and *Menude v. Delaire*, Id. 565. In *Taylor v. Wheeler*, the defect of a surrender in a mortgage of copyhold was supplied against the assignees of the bankrupt mortgagor; here the complete legal title was in the trustees of the creditors. The chancellor at first doubted, but said that the creditors would be entitled to no more than was properly the bankrupt's. I need hardly observe, that there is no question of notice or want of notice to creditors, where fraud, arising out of the possession of the mortgagor or vendor, is relied on. I do not find the precise case of an attachment, but there can not be a doubt that it must be governed by the same principles. Its lien can not be of a higher nature than that of a judgment and execution. It holds the property that it may be rendered liable to execution. It could not take the property against the lien of an older execution, against which, however, the equitable claim would prevail. Still stronger is the case of the bankrupt's assignees. It was a ground of the decision at law, that if any equitable lien existed, the remedy was in equity, and the plaintiff can not be repelled, now that he comes into equity to seek it. It is therefore ordered and decreed, that the chancellor's decree, refusing the injunction, be reversed, and that the defendants, attaching creditors of Patrick Usher, be enjoined from proceeding against the Junietta.

JOHNSON and O'NEALL, JJ., concurred.

THE PRINCIPAL IS BOUND BY THE SEALED CONTRACT or deed of his agent only when it is executed in his name. It will not suffice that the agent signing his own name adds thereto words describing himself as agent, as was done in the principal case: *Andrews v. Estes*, 26 Am. Dec. 521, and note; *Stone v. Wood*, 17 Id. 529; *Taft v. Brewster*, 6 Id. 280; *Stinchfield v. Little*, 10 Id. 65; *Locke v. Alexander*, 11 Id. 750; *McDonough v. Templeman*, 2 Id. 513; *Elwell v. Shaw*, 8 Id. 126.

INNOCENT PURCHASERS, RIGHTS OF.—A court of equity will not deprive an innocent purchaser of a legal advantage in favor of a latent equity: *Patrick v. Marshall*, 4 Am. Dec. 670; and so liens for purchase money will not be enforced against a sub-purchaser, for value, without notice: *Blight v. Banks*, 17 Id. 136.

EQUITABLE TITLE PREVAILS against creditors of him who has naked legal title: *Morgan v. Morgan*, 21 Am. Dec. 638. The execution of a deed, and its recording, is valid as against an attaching creditor of the grantor, whose attachment is levied before an actual delivery to the grantee: *Hedge v. Drew*, 22 Id. 416.

RELIEF IN EQUITY AGAINST MISTAKE, when owing thereto a writing has failed to fulfill the intent of the parties: See *Chamberlain v. Thompson*, 28 Am. Dec. 390, and cases collected in note

BOYKIN AND WIFE v. CIPLES ET AL.

[2 HILL CH. 200.]

A MARRIED WOMAN IS NOT BOUND BY THE DEED OF HER HUSBAND, of property settled to her separate use.

THE HUSBAND IS TRUSTEE, FROM NECESSITY, for the wife, where property has been settled to her separate use, but without the intervention of a trustee, and is therefore, in such case, a necessary party to a suit for the recovery of the property in behalf of the wife, and will in such suit dispense with the necessity of any farther *prochein amy*.

IDEM.—THE HUSBAND, THOUGH HE MAY BE A TRUSTEE of necessity, is never a proper trustee, and if trustee from necessity, will be replaced by the court, upon a bill filed, concerning the wife's separate property, coming before it.

BILL in equity. By the will of John Adamson, deceased, there was left to his two daughters and to his granddaughter, certain personal property, to their sole and separate use and benefit, without being in any manner subject to the debts, contracts, or forfeitures of their husbands, for their natural lives, and upon their death to the heirs of their respective bodies then living, or if there were failure of such heirs, then the share of the one dying without such heirs should go to the others. The husbands of these legatees, desirous of barring this contingent remainder, executed, with the consent of their wives, interchangeable deeds of release of their wives' right, under the remainder, with covenants of warranty against any future claim by themselves, their wives, or any one claiming under them.

Afterwards Mrs. Delesseline, a daughter of testator, died without issue, whereupon plaintiff and his wife, the granddaughter, brought this suit to recover their proportionate share of the property left Mrs. Delesseline, as by the terms of the remainder, limited in the will.

King, for the appellants, defendants below.

Petigru, contra.

HARPER, J. The only question necessary to be considered is, whether a married woman may sustain a suit for her separate property, her husband being joined in the bill. If she may, she certainly can not be estopped by her husband's deed, made in his individual capacity.

When property is settled to the separate use of a married woman, and no trustee is appointed, it is the known rule of the court that the husband shall be made a trustee. Being such trustee, it should seem that he was a necessary party to a suit

for the trust property, and being liable for costs, that any other *prochein amy* was unnecessary. It is true that it was said by Lord Hardwicke, *Pawlet v. Delaval*, 2 Ves. sen. 663, if a bill be brought by husband and wife for the wife's property, it is the husband's bill; but in that case, for aught that appears, the suit was for the benefit of the husband.

He explains in *Griffith v. Hood*, 2 Ves. 453, that "where there is anything for the separate use of the wife, a bill ought to be brought by her *prochein amy* for her, otherwise it is her husband's bill. However, there have been cases of such a bill by the husband and wife, and the court has taken care of the wife, and ordered payment to some person for her."

This is, I suppose, what we are bound to do, if the bill be sustained. A husband, from necessity, is construed the trustee of the wife, but he is not the proper trustee. In general, the office of a trustee is to protect the property against the husband.

The chancellor's decree is therefore affirmed, and it is ordered that it be referred to the commissioner to report to the court of chancery, at its next sitting, a proper person to be appointed the trustee of the plaintiff, Mrs. Boykin, and that upon such trustees being appointed, the property allotted to Mrs. Boykin under the writ of partition, be delivered to him to be held to the uses of John Adamson's will.

JOHNSON and O'NEALL, JJ., concurred.

A MARRIED WOMAN MAY HOLD SEPARATE PROPERTY in equity, through the intervention of a trust, though no trustee has been appointed: *Carroll v. Lee*, 22 Am. Dec. 330.

THOMPSON ET AL. v. MURRAY ET AL.

[2 HILL CH. 204.]

THE WIFE CAN NOT BE ENDOWED, in the estate held by her husband, as trustee.

CONTRIBUTION AMONG DONEES, for the discharge by one of a burden incident to the entire property of their common donor, will not be enforced where the donor retained, after the gift, sufficient property to satisfy the burden, and to which it might have been remitted by proper proceedings; therefore one of several donees, who has had the property given him seized under execution issued against his donor, and thereupon sold, is not entitled to contribution, where the donor had property ample to discharge the execution, and to which the execution creditor might have been compelled to resort.

A POWER OF APPOINTMENT BY WILL given a married woman, by a deed conveying property to a trustee for her use, is valid, and does not need, to justify its exercise, the express consent of the husband.

BILL in equity. The bill, to which were parties plaintiff, Thompson, his wife, and Michael Murray, son of the latter by her former husband, John M. Murray, set forth a purchase by the latter, during the existence of his marriage with Mrs. Thompson, of a lot in Charleston, and a subsequent conveyance of the same by him to Stevens Perry, a defendant herein, in trust for Mrs. Connoly, Mrs. Thompson's mother, by a deed conferring upon Mrs. Connoly the power of devising the same. Mrs. Connoly afterwards exercised the power in favor of Mrs. James Murray, another of her daughters, upon the condition that certain payments be made Michael Murray. The bill claimed that this exercise of the power was void, because of having been without the consent of Mrs. Connoly's husband; that, in consequence, the land either reverted to the use of the grantor, Murray, and of his will, by which a life estate in all of his property was given to his wife, remainder to his son; or that else it should be distributed among the heirs of Mrs. Connoly. A release of her dower in this lot, which had been given by Mrs. Thompson at the time that her former husband conveyed it, was sought to be avoided, upon the ground of infancy at the time that it was made. Contribution was also sought against Mrs. James Murray because of slaves given, some to Mrs. Murray, some to Mrs. Thompson, by their father, Richard Connoly. One given the latter had been seized and sold under execution issued against said Richard Connoly. The other facts appear from the opinion.

Bailey and Lance, for the appellants.

Dunkin, contra.

O'NEALL, J. Upon the plaintiff's third ground of appeal, it is only necessary to remark, that the chancellor says that there was no proof of the infancy of the plaintiff, Mrs. Thompson, then Mrs. Murray, at the time she renounced her dower. This is a very sufficient answer to the ground. But without saying that even infancy would avoid her renunciation of dower, there is another view which would prevent her from being endowed of the premises. According to the proof, her husband (Murray) purchased the premises as a trustee for Mrs. Connoly, and paid for them with money furnished by her. His seisin was, therefore, entirely in trust, and of such an estate, it was held in the case of *Plant v. Payne*, 2 Bail. 319, the wife could not be endowed.

As to the plaintiff's second ground, there can be as little

difficulty; for let it be conceded that generally, as among volunteers, there ought to be contribution to remove a general lien attached upon the whole property conveyed; yet this case can not have the benefit of such a rule. For contribution can never be asked for on account of the removal of a common burden on property conveyed, unless there was an inevitable necessity that a part of the property conveyed should pay it; *Screven v. Joyner, executor, and others*, 1 Hill Ch. 261 [26 Am. Dec. 199]. This inevitable necessity or compulsion to pay might exist among volunteers, where the donor had given to them his whole estate, and was thereby rendered insolvent, or had given to them a part of his estate, and had subsequently become insolvent. But such necessity or compulsion can not exist when the donor is still solvent, and a creditor seizes and sells the property given, or the donee pays the donor's debts. For in such a case the creditor either has no right to sell the property at law, or in all events in equity, and would be forced, on a proper application, to exhaust the donor's estate before he would be allowed to go against property which his debtor had given away. In this case it is not pretended that the donor is insolvent; and it hence follows that there can not have been that inevitable necessity or compulsion to pay out of the property conveyed to the plaintiff, Mrs. Thompson, which is necessary to entitle her to contribution from the other donee. This view of the case is upon the supposition that the plaintiff, Mrs. Thompson, and her sister, Mrs. Murray, the defendant, had been shown to be donees in possession at the time the sheriff sold the slave conveyed to Mrs. Thompson, and decides the case upon the most favorable footing on which the plaintiffs could put it.

The first ground of appeal makes the question, whether the deed from John M. Murray to Stevens Perry, the trustee, could empower Mrs. Connolly (a *feme-covert*) to make a will. I am satisfied, both that the power could be conferred on a married woman, and also that it was well executed by her will, and that the express consent of the husband is wholly immaterial to the validity of either. For notwithstanding in general legal contemplation, the existence of the wife is merged in that of the husband during coverture, yet this rule is not of such universal application as to render every act of the wife void. It seems she may even purchase and hold real estate without the express consent of her husband—that her acquisition can not be defeated by any one but him, so long as he may live. For in Coke upon Littleton, 3, a, 122, 123, it is said: "A *feme-covert* can

not take anything of the gift of her husband, but is of capacity to purchase of others without the consent of her husband, and of this opinion was Littleton in our books and in this book, section 677; but her husband may disagree thereto and divest the whole estate; but, if he neither agree nor disagree, the purchase is good; but after his death, albeit her husband agreed thereto, yet she may, without cause to be alleged, waive the same, and so may her heirs also, if after the decease of her husband she herself agreed not thereunto." In this case neither the husband nor the heirs of the wife ask to set aside the conveyance to the wife: the plaintiffs regard the conveyance as good, but the power to appoint is void. But, if the wife could purchase, she might on any conditions, and under any limitations, and it is the privilege of the husband during coverture, of herself or her heirs after his death, to affirm or disaffirm the whole contract; a part can not be taken and a part rejected—all or none must stand.

If however the wife was incompetent to execute the power conferred on her by the deed, then her will would be void, and the land must either revert to the grantor, Murray, or be distributed as her estate. It seems to be well settled, "that every person capable of disposing of an estate actually vested in himself, may exercise a power or direct a conveyance of the land. The rule goes further, and even allows an infant to execute a power simply collateral and that only; and a *feme-covert* may execute any kind of power, whether simply collateral, appendant, or in gross, and it is immaterial whether it was given to her while sole or married. The concurrence of the husband is in no case necessary." This is the language of one of the greatest chancery lawyers of the present day, Chancellor Kent; and it can not be necessary to do more than refer to his clear statement of principles, by which this part of this case must be put at rest. It may be well however to look to the manner in which an appointment operates, to show that no objection can in fact exist to an execution of it by a *feme-covert*. The appointee is merely designated by the person making the appointment; his estate and rights are derived from the deed creating the power. As is said in *Bradish v. Gibbs*, 3 Johns. Ch. 550, the principle is well established that when a person takes by execution of a power, he takes under the authority of that power. The meaning is, as Lord Hardwicke expresses it, that the person takes in the same manner as if the power and instrument executing the power had been incorporated in one instrument, and

as if all that was in the instrument executing had been expressed in that giving the power. This being the case, and the appointee taking nothing from the wife, but all from the person creating the power, there can be no reason to avoid her act on account of coverture, the disability of which is intended both for the protection of the husband and also for herself.

It is ordered and decreed that Chancellor Johnston's decree be affirmed.

JOHNSON and HARPER, JJ., concurred.

CONTRIBUTION, right to, does not exist unless the charge on which payment was made was enforceable also against those from whom it is sought; therefore, if a charge common to lands has ceased to be enforceable against the lands of one of the parties, as by operation of the statute of limitations, such party can no longer be held to contribution, for the payment does not benefit him: *Screven v. Joyner*, 26 Am. Dec. 199. As to contribution among donees, see *Chamberlayne v. Temple*, 14 Id. 786.

The doctrine of contribution does not arise from any contract between the parties, but from a principle of natural equity: *Moore v. Moore*, 15 Am. Dec. 523; *Sherrill v. Woodard*, 25 Id. 714; *Campbell v. Mesier*, 8 Id. 570. Where incumbered lands are sold, and the lands last sold are taken under execution in satisfaction of the incumbrances, no action can be sustained against the prior purchasers for contribution: *Nailer v. Stanley*, 13 Id. 691; *Stoney v. Shultz*, 27 Id. 429.

FEME-COVERT, WITH RESPECT TO HER SEPARATE PROPERTY, settled to her separate use, by deed or will, and subject to her exclusive control, is considered a *feme-sole*, and her contracts concerning the same are enforceable in equity: *Martin v. Dwelly*, 21 Am. Dec. 245; *Jaques v. Methodist Episcopal Church*, 8 Id. 447.

ADM'R AND ADM'X OF JOHNSON v. EX'R OF JOHNSON.

[2 HILL CH. 277.]

THE GUARDIAN OF AN INFANT HEIR, from the time of the division of the estate between the heirs, is responsible for the entire income of that part of the estate set off to his ward; and subsequent receipts, of parts of the income by the former executors, will not relieve him.

AN EXECUTOR, GUARDIAN ALSO OF THE INFANT entitled under the will, must account for the income of the estate coming to his hands in his capacity of guardian.

THE UNACCOUNTED BALANCE OF A FUND intrusted to the management of several, will be charged to those in default through failure to account.

A VERBAL DISCHARGE OF HIS GUARDIAN, by a ward just arrived of age, where there has been no accounting between the parties, and where misrepresentations of the guardian have induced the ward to believe that no funds belonging to the latter have been retained by the former, will not bar a subsequent bill for an account.

IDEM.—A REGULAR RELEASE, under such circumstances, would not be supported.

THE SURETY ON A GUARDIAN'S BOND IS LIABLE, upon the default of his principal, to the extent of the penalty of the bond as respects defaults concerning not only the estate of the minor, as it was at the time of the appointment, but also as to that subsequently acquired.

A FATHER HAS NO AUTHORITY TO RECEIVE A LEGACY LEFT HIS CHILD, and an executor paying the father from the funds of the estate, the amount of the legacy left his infant son, is liable to an account to the estate for such sum.

WHERE THERE ARE SEVERAL EXECUTORS, THERE IS NO JOINT LIABILITY on the part of all for the separate act of one; but where several concur in any act, then their liability for that act is joint.

IDEM.—AN EXECUTOR CAN NOT SHIFT HIS RESPONSIBILITY for a fund come to his hands, by a transfer of the fund to a co-executor, but will, in the event of such transfer, be answerable for his co-executor in the same manner that he would be for a stranger whom he had enabled to receive the fund.

A FATHER OF SUFFICIENT ABILITY is liable for the support and maintenance of his child, notwithstanding that the latter has property of his own.

A TENANT IN COMMON OF THE FEE IS LIABLE TO AN ACCOUNT FOR WASTE, if he cuts timber and clears woodland on the estate to an extent beyond that of his interest in the fee.

TENANT FOR LIFE IS LIABLE TO ACCOUNT FOR WASTE where he has cut down more of the wood on the estate than is necessary to the enjoyment of his estate, to the injury of the remainder in fee.

A BILL OF REVIVOR IS NOT ALWAYS NECESSARY where the execution of a former decree is sought; that relief will be allowed upon a bill, not one of revivor, where the bill, besides the former decree, introduces much other new matter.

BILL for an account. Plaintiff's intestate, a posthumous child of Thomas N. Johnson, sen., had, during the latter years of his minority, for guardian Robert Brailsford, upon whose bond as sole security was Alex. W. Garden. During Brailsford's guardianship, Mary Johnson, mother of the intestate, died, leaving him by her will her whole estate other than a thousand-dollar legacy left Brailsford's infant son. To Mrs. Johnson's will were executors, Brailsford, Alex. W. Garden, and Dr. Johnson; of these Garden obtained an order directing the sale of the perishable property of the estate. The sale was thereupon made, but of the proceeds thereof a full return and account was never made. Garden also paid over from the funds of the estate to Brailsford, the one thousand dollars left his son. Garden seems to have had no farther concern with the estate, which was subsequently managed by Brailsford. Garden afterwards died, whereupon Brailsford instituted suit against his representatives and his minor children, to recover from them, in behalf of

his ward, property which Garden had enjoyed during life, it having been left his first wife, a daughter of Thomas N. Johnson, by her father, with a proviso to the effect that "should my daughter marry and leave at her death a husband and no children, then her husband shall have the profits and use of the estate during his life-time." This daughter died, after her marriage with Garden, without issue. In this suit by Brailsford, this ward was decreed entitled to one half of the personal property, and five sixths of the real estate, devised to Garden's first wife by her father. A partition was accordingly made, under which a sum of four hundred and seventy dollars became due from the ward to Garden's representatives, for the purpose of equalizing the same. An account of the rents and profits was also decreed. This account was never taken, nor was the sum due from the ward on the partition paid.

Upon the ward's coming of age no accounting between him and his guardian took place, though an offer of a release was made by the ward to the guardian, in the manner mentioned in the opinion. In 1826, two years after his arrival of age, the ward died. Soon after, Brailsford died. Mr. James was thereupon appointed guardian to Brailsford's minor son, and demanded of Dr. Johnson, surviving executor of Mrs. Johnson, payment of the one thousand dollar legacy left by Mrs. Johnson to his ward. Dr. Johnson made the payment from funds of the estate in his hands. It appeared that Dr. Johnson, who was an executor of the estate of Thomas N. Johnson, sen., as well as that of Mrs. Johnson, had, after Brailsford's appointment as guardian, received considerable sums, part of the income of both these estates.

The other facts of the case and the questions raised, appear from the opinion.

McCrary and Memminger, for the plaintiffs.

Toomer, *contra*.

O'NEALL, J. (after stating the facts). The questions arising out of these facts, seem to me to be the following, viz.:

1. Ought Robert Brailsford to be charged as guardian with the income derived from the estate of Thomas N. Johnson (which was assigned to him as his part of the estate of his father), from the time of his appointment as guardian?

2. Ought he to be charged as guardian, with the income of Mary Johnson's estate from 1819?

3. Is the parol discharge of Robert Brailsford by his ward,

just after he attained to maturity without an account, a sufficient discharge in law to bar the account now claimed?

4. Is Alexander W. Garden, the security of Robert Brailsford, the guardian, liable to the extent of the penalty of his bond, for the arrears of the said Robert on account of his said guardianship?

5. Is Alexander W. Garden liable as executor of Mary Johnson, to account to the plaintiffs for the one thousand dollars, with interest thereon, paid to Robert Brailsford, on account of the legacy to his son?

6. Is Alexander W. Garden, as executor, accountable for the amount of the sale of the perishable articles sold as Mary Johnson's estate, with the interest thereon?

7. Was waste committed by Alexander W. Garden, and if so, are the plaintiffs entitled to an account for the same?

8. Are the defendants in this case liable to account for the rent and hire directed to be accounted for in the former decree?

Each of these questions has been most elaborately discussed, and has been maturely considered by the court. The able and zealous counsel for the defendants has made us feel deeply for the orphan, who, from his statement, will be stripped of everything by our decision: but it is not for us to give way to the feelings of men—our duty is a stern and inexorable one, to administer the law, which, as the chancellor said in this cause, is justice. The several questions will, as briefly as possible, be disposed of in the order in which they have been set down.

1. There can be no question that the guardian, Robert Brailsford, is alone accountable for the income of that part of the estate of Thomas N. Johnson the younger, derived from his father; for as guardian, he seems by his own return to have been in the possession of the *corpus* of the estate: but in law, after the division between Thomas N. Johnson and Sarah, and after a guardian had been appointed for the minor or minors, the executors were no longer accountable for the future income of the estate. The guardian was alone entitled to the possession of his ward's estate, and must, as a matter of course, be regarded as in the receipt of the income. If Doctor Johnson received a part of the income, it must have been as the agent of the guardian: for he had no other right to receive it. It is probable that when the accounts of the receipts and expenditures of the guardian, and of Doctor Johnson, regarded as his agent in this respect, come to be examined, that all the supposed hardships of this part of the case will vanish. But be

that however as it may, Brailsford must account for the income of the estate, and show how it has been expended, and must be held responsible for any balance which may be found on the foot of his account.

2. There is perhaps a little more difficulty in the question, as to his liability to account as guardian for the income of Mary Johnson's estate. He, Doctor Johnson, and Garden, were the executors of her will. Garden acted, as appears from the papers, for only a single year. The plantation and negroes were in the immediate vicinity of Brailsford, and it seems to be pretty well established from the defendant's own showing, that he had the entire management of all Thomas N. Johnson's estates, whether derived from his father or mother, which were in the country. These facts constitute such a reasonable showing, as would charge Brailsford with an account for the income, as executor, or as guardian. He must, however, by operation of law, account in the latter character; for whatever funds he had in his hands as executor for Thomas N. Johnson, by operation of law, were transferred to his account as guardian. In addition to the view which I have suggested, it may be added, that executors are only jointly liable, so far as they concur in an act done in the administration of their testators' estates. Each is primarily regarded as separately liable; and as between themselves, this is always the rule: *Motte v. Schull and Motte*, 1 Hill Ch. 146 [26 Am. Dec. 194]. It will be observed that Doctor Garden has accounted for his receipts of the income during the single year, in which he acted as executor. Doctor Johnson, in this case has filed his account, which is satisfactory to the parties. Mr. Brailsford has never exhibited any account of his receipts, unless it may be embraced in the account from 1818 to 1824, found among the papers furnished to me. The fair presumption from these circumstances is, that he is alone accountable for that part of the income unaccounted for. It is plain, that the income exceeds the sum received by the other executors. It is conceded that in this respect they have fairly accounted: the balance unaccounted for, may be fairly charged to him who, by his default in not accounting, is legally presumed to be in the wrong. Add to these considerations the fact, that as guardian, he ought by law, at the expiration of one year after his testator's death, to have compelled the possession of his ward's estate to have been delivered to him, and his liability to the account is sufficiently made out.

3. I am perfectly satisfied that the verbal discharge can not

operate. The only mode in which it could have effect, would be as an admission that an account had taken place between the guardian and the ward, and that the former had paid to the latter the balance due. But nothing of this kind did take place; the guardian, Brailsford, as appears in this cause, had not made out his accounts until after the death of Thomas N. Johnson. He did not even pretend at the time spoken of by Mrs. McLeod, the witness, to make any statement of the accounts of his guardianship with his ward. "He" (Mr. Brailsford) said, "he did not care much about it (the discharge), as he had delivered up all the property, and did not have any money concerns with the estate—that part was conducted by his co-guardian, Dr. Joseph Johnson, who would have to account for the funds." This testimony of the witness puts the discharge out of all question; for it shows that there was not only no accounting, but also that the guardian had deceived the ward in inducing him to believe that he had no funds belonging to him in his hands.

But, if a regular release had been executed, it could not have been supported. A guardian dealing with his ward, just after he has arrived at full age, and obtaining any beneficial contract from him, or a release of the ward's rights, must, in order to have it sustained, show its fairness. In this case, the supposed discharge was probably in less than a year after the ward attained to full age, and at or about the time that he received the possession of his estate: and there is not only no proof of fairness in the transaction, but there is abundant reason to believe, that whatever Mr. Johnson did say, was said in ignorance of his rights. The case of *Hylton v. Hylton*, 2 Ves. sen. 547, is a clear and direct authority against the allowance of the release to the guardian, even if it had been regularly executed.

In that case, "the plaintiff had considerable gifts or provisions left to him by the will of Philippa Downs, his aunt, and Charles Palmer, his half brother. The defendant, his uncle, was acting executor and trustee in both those wills, and also acted as guardian to him during his minority, having neither father nor mother. Coming of age in April, 1746, he, in October, 1747, entered into a transaction with his uncle, whereby he granted to him an annuity of sixty pounds, gave him a general release, and two written discharges, all signed the same date with the grant upon his delivering up several papers." "The bill was filed to set aside the grant of the annuity upon the general principles of being made just after coming of age

without being thoroughly informed," and Lord Chancellor Hardwicke decreed accordingly. In the conclusion of his opinion, the lord chancellor says: "Nor is there any evidence of an account made up of the personal estate proved to have come to the defendant's hands. Certainly, if anything could make such a transaction supportable, it must be where there was a real and fair account; of which there is no evidence: yet a general release is given upon delivering up several papers and vouchers as they are called."

It will be observed that the chancellor says in that case, that the only circumstance which could sustain the grant of the annuity, was "a real and fair account:" the same rule governs a release, which is in point of fact a gift to the guardian of his arrears; and unless the ward sees most clearly what he is about to do, it can not be supported. In the case under consideration, that knowledge is wanting, and in every point of view, the defense attempted to be set up in this respect must fail.

4. That the security of the guardian is liable for the default of his principal to the full amount of the penalty of the bond, is, I think, too plain a proposition to require much illustration. The appointment of a guardian of the person and estate of a minor, is not, as was supposed by my friend, the counsel for the defendants, limited to the property set out in the petition, praying that the appointment should be made. The court may, it is true, so limit it; but unless the appointment is restricted and special in its terms, it extends to all the property which the minor may then or afterwards possess. It is hence that the bond is always taken in a larger sum than the net value of the ward's estate at the time the appointment is made. There might have been some difficulty about the jurisdiction of the court, to decree against the security: but, as in the case of *McDowell v. Caldwell*, 2 McC. Ch. 43 [16 Am. Dec. 635], that question was not raised by the defendants, and the court will at once, without any circuity of action, hold the representatives of Doctor Garden liable, so far as they may have assets real or personal, and to the extent of the penalty of the bond, for the default of the guardian, Robert Brailsford.

5. I think that Alexander W. Garden is liable as executor, to the plaintiff's intestate for the one thousand dollars and interest thereon, paid by him to Robert Brailsford for his son's legacy. The truth of this conclusion depends upon showing that this payment was an illegal one, and that the payment made by Doctor Joseph Johnson, the surviving executor, out of the re-

siduary estate, was proper, and entitles the plaintiffs' intestate to the account, as against Garden, the executor. It was contended that the payment to Robert Brailsford, as the father of the legatee, was good. But this is wholly untenable. The point was very fully considered and adjudged by Chancellor Kent, in the case of *Genet v. Tallmadge*, 1 Johns. Ch. 3. He held, after a general review of the decided cases, that a father, as such, had no right to receive the legacy of his child. To attempt to add anything to his conclusive array of authorities, would be an idle consumption of time.

It was next urged, that although the payment to him, as father, might not be good, yet, that as co-executor, he had the right to receive the legacy, and that his receipt of the money discharged Garden. I have already had occasion to say, that primarily executors are regarded as separately liable; but that, if they concur in any act touching their testator's estate, that they are jointly liable. This is, I think, a wise rule in both its parts—the latter is only subject to objection on the present occasion, and it is only necessary that it should now be vindicated. If it were the case that executors when they concurred in an act were not required to account for it jointly, there could be no safety to an estate. Responsibility might be shifted at pleasure by transferring the funds; and a solvent executor might release himself from liability, by simply producing the receipt of an insolvent co-executor. For the sake of some pecuniary advantage or other cause, an executor might desire to give up his trust; it has been held that the courts can not release him; and yet, by simply turning over the funds to his co-executor, he might be released, if his liability ceased as soon as he parted with them to his co-executor. If he chooses to turn over a fund in his hands to his co-executor, he is generally responsible for its administration; for he thus makes the other his agent for its application. Both are liable to their *cestuis que trust*, for both have had the actual control of the fund, and both have concurred that one should manage it. If it is a well-settled rule of law, "that where by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had enabled to receive it," Toller's Law of Ex'rs, 484, it is our duty to give it effect in this case, by holding Garden to be liable for the one thousand dollars paid to Brailsford for his son's legacy and by him not paid over.

Without going through all the cases bearing upon this position, it will be sufficient to cite and examine some of the leading cases. In *Crosse v. Smith and Munt*, 7 East, 246, the defendants were co-executors of Grierson, who was indebted by bond to the plaintiffs' intestate. Smith having four hundred pounds of the assets of his testator, remitted the same to Munt, for the purpose of being paid over to the payment of Grierson's debt; he however paid it to a simple contract debt due by Grierson to himself, and subsequently became bankrupt. The question was, whether Smith was liable for the misapplication of the four hundred pounds, and it was held that he was. The only possible distinction between that case and the one under consideration is, that there the question was made by a creditor plaintiff, and here by the residuary legatee. I am persuaded from the best examination I have been able to give to the subject, there is no such just distinction; but that will be further considered in the sequel. In the case of *Crosse v. Smith*, Lord Ellenborough's concluding words state very fully and forcibly the legal conclusion, making out almost in terms the rule which I have stated from Toller. He said: "In conformity therefore to the rules of law as handed down to us in respect to executors, we are obliged to pronounce that the defendant, Smith, having once received and fully had under his control assets of the testator applicable to the payment of this bond debt, was responsible for the application thereof to that purpose, and such application having been disappointed by the misconduct of his co-executor, whom he employed to make the payment in question, he is liable for the consequences of such misconduct, as much as if the misapplication had been made by any other agent of a less accredited and inferior description." It may however be objected to that case, that it was at law, and that in equity, a different rule prevails: but this is a mistake, equity is bound as much by legal rules where they apply to the case as a court of law. Relief may, and often is given in equity where it can not be at law, owing to the difference in the modes of proceeding, and the effect of the judgments of the two courts: at law, the judgment gives effect to a previously existing legal right: in equity, the decree creates a legal right out of a contract or trust. But it will be seen on looking to Lord Ellenborough's judgment, that he founds it mainly upon cases decided in the chancery court, and it is hence apparent, that the rule is the same in both courts.

In *Sadler v. Hobbs*, 2 Bro. C. C. 114, the bill was filed by a

residuary legatee for his legacy, and in the report on the accounts, it appeared that Davies had joined with Reeve, his co-executor, in drawing two bills of exchange, amounting together to seven thousand pounds on the house of Trueman, Reeve & Co., payable to Devonshire & Reeve, as he supposed, in satisfaction of the testator's debt to them to that amount; but he was in this respect mistaken, the debt being only three thousand pounds, so that the executors had paid four thousand pounds too much. Reeve, the executor, who received the money under the bills of exchange, afterwards became bankrupt. The question for the court was, whether the joinder of Davies in the bills of exchange, without the receipt of the money, made him answerable to the plaintiff for it. Lord Chancellor Thurlow ruled that he was; and stated the rule to be, "that where, by any act or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall be both answerable." In a note to that case (note 1) the editor remarks, that "*Westley v. Clarke* (before Lord Northington, and lately reported in 1 Eden, 357), mentioned in the case of *Sadler v. Hobbs*, with some disapprobation (whether rightly determined as to its peculiar circumstances, 4 Ves. 609¹), seems to have given occasion to relax the sound and intelligible rule which previously prevailed, viz.: that where either executors or trustees (and executors more especially) joined in any act which as to them was unnecessary, and a loss happened, the parties thus unnecessarily concurring should be held responsible, although none of the funds came into their hands: that rule seems to be now restored;" and he refers to a host of authorities in support of his assertions. Although in the words of this note, and of Lord Thurlow in the case of *Sadler v. Hobbs*, there is some difference from those employed by Toller, in stating the rule as I have done, yet the difference is merely verbal: the rule is identical in substance. For the meaning is clear throughout, that the concurrence to charge an executor for the act of a co-executor, must be voluntary and not the result of legal necessity. The case of *Sadler v. Hobbs* and that under consideration are almost identical. That case as well as this was in equity, and on a bill filed by the residuary legatee: the concurrence there, was not greater than it is here; it was a payment to a co-executor as one of a firm, supposing him entitled to receive it on account of a debt, when in fact he received more than the firm was entitled to: so in this case, it was a payment to a co-

1. *Hovey v. Blackman*.

executor, supposing him entitled to receive it for his son's legacy.

The case of *Joy v. Campbell*, 1 Sch. & Lef. 328, maintains the same position. At page 341, Lord Chancellor Redesdale states the rule with his accustomed fullness and clearness. "The distinction," he says, "seems to be this with respect to a mere signing: that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been whether the money was under the control of both executors: if it was so considered by the person paying the money, the joining in the receipts by the executor, who did not actually receive it, amounted to a direction to pay his executor, for it could have no other meaning; he became responsible for the application of the money just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor." This clear view of the rule is in exact accordance with all the previous authorities; and carries out and enforces the explanations and application which I have given or made. Test the case before us by Lord Chancellor Redesdale's criterion, "whether the money was under the control of both executors," and it will be seen that Dr. Garden's liability is fixed beyond all doubt: he had the control of the money until he paid it over to his co-executor on a mistaken view of his power to receive it for his son, and it follows that having had the control he is liable for it.

It can not be necessary to multiply authorities to establish a rule which is now conceded by all the law and equity writers to be settled law. But it is said that there is a distinction in the application between a creditor plaintiff and a legatee plaintiff: as I have already said, that distinction can not be maintained. The case of *Sadler v. Hobbs*, which I have already stated and commented on, shows that the application of the rule is allowed even in the case of a residuary legatee plaintiff and the lord chancellor, in that case, speaking of the distinction in the reasoning of Lord Chancellor Harcourt, in the case of *Churchill v. Hobson*, 1 P. Wms. 241, calls it (as it deserves to be called) an odd distinction. But as Chancellor Harcourt's remark in *Churchill v. Hobson* was a mere *dictum*, and not the point ruled, it could not have created the doubt which does

seem to have existed on the subject. It is referable more probably to the case of *Westley v. Clarke*, before Lord Northington, 1 Eden, 357: but although it had the effect to relax the old rule, yet, as the editor observes in his note to the case of *Sadler v. Hobbs*, "that rule seems now to be restored." The case of *Bacon v. Bacon*, 5 Ves. 331, is no authority for the distinction between creditors and legatees as to the liability of co-executors; there the payment to the unqualified co-executor was sustained, not on account of his character as executor, but because he was the testator's attorney, and the payment to him was in the regular course of business. I am not prepared to say that a case decided under its special circumstances (as that case was), is ever authority for any purpose; but it is clear, without utterly condemning it, that it proves nothing in this case. In *Doyle v. Blake*, 2 Sch. & Lef. 230, the bill was by the legatees against the solvent and surviving executors, who had renounced in favor of the now deceased executor Horan, who afterwards obtained administration *cum testamento annexo*, received and wasted the funds, and became insolvent; it was ruled that they were liable for his acts. In the case, Lord Redesdale says, "legatees are bound by the terms of the will; creditors are not so; and therefore in many cases executors would be discharged as against legatees, though not as against creditors."

This, regarded as an abstract proposition, is a startling one; but when explained by the subject-matter of which the lord chancellor was speaking, is plainly right. The testator, in the case then before him, had directed all the funds to be deposited with the co-executor, Horan, as trustee for the legatees. It is clear beyond all doubt, that such a payment to him under the will would have been good against the legatees: for as between them and the other executors, Horan would have been, under the will, the agent of the legatees, in the receipt of the money, and they would have been bound; but creditors would not have been, for he had no right to receive as trustee until the debts were paid. With this explanation, the case is consistent with itself and all the previous cases. For in the point ruled by the decision of the case (as I have already stated it), and the lord chancellor's reasoning, at page 242, it is a direct authority in support of the general and old rule. But as was well said in the argument, the case of *Langford v. Gascoyne*, 11 Ves. 333, uproots the distinction supposed to exist between creditors and legatees. That was a bill by a widow claiming to

be a legatee for life, and the general residuary legatees. There were three executors, Gascoyne, Lambert, and Spurrell: the day after the testator's funeral, the three executors met at his house. His widow brought out to them a bag of money, and on being advised not to trust it to Gascoyne, she delivered it to Spurrell, in the presence of the other two. He counted it and handed it to Gascoyne. It was held by the master of the rolls, Sir William Grant, that Spurrell was liable. He says: "The rule in all the cases is, that if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other; not where an executor is merely passive, by not obstructing the other in receiving it." In the case of *Monell et al. v. Monell*, 5 Johns. Ch. 283-288 [9 Am. Dec. 298], Chancellor Kent, speaking of this subject, said: "A rule once prevailed in England which was recognized in Pennsylvania, 1 Dallas, 311,¹ that either of two executors who had executed receipts for assets, was liable to the legatee for the amount only actually received by him. But that rule is exploded, and the doctrine now established at law and in equity is, that if assets come to the hands of one executor only, but both join in a receipt for them, both are equally liable to legatees and creditors."

In this state no distinction has ever been made between creditors and legatees. In *Evans v. Evans*, 1 Eq. 520, Chancellor Rutledge, speaking of the liability of executors for joint acts, although only one received the money, said, "as they were all consenting and joined in the sale, they must all be responsible for the debts, but not one for the separate act of the other." In *Lenoir v. Winn*, 4 Id. 65 [6 Am. Dec. 597], and in another case in the same book, page 92, the rule is loosely stated, but most obviously in reference to it as stated by Chancellor Rutledge in the case of *Evans v. Evans*, and in the English authorities. It is, I think, therefore clear beyond all doubt from this array of authorities, that in a suit by a legatee as well as a creditor, both at law and in equity, "that where by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had enabled to receive it."

But it was contended that admitting this to be true, yet that the plaintiffs were not entitled to recover, because the executor had misapplied, and therefore wasted the fund, and that their

1. *Appeal of Brown.*

intestate having received his residuary legacy, could not have been called upon by the legatee, Theodore Brailsford, to pay his legacy: and that therefore the payment, by Dr. Johnson, was altogether voluntary; and the case of *Lupton v. Lupton*, 2 Johns. Ch. 614-627, was cited in support of this position. It does, beyond all doubt, prove that where the executor has wasted the assets, that a legatee who has been paid must refund to a creditor, but can not be compelled to contribute to make up a legacy to a co-legatee. But the authority has no application to this case. A part of the assets of Mary Johnson, deceased, were unadministered and in the hands of the surviving executor at the time the guardian of young Brailsford demanded payment. He was legally liable to meet the demand. For there had been no sufficient legal payment to the legatee; and having assets of the estate in his hands, equal to and beyond the amount claimed, he had no cause to allege why he should not pay the legacy and the interest due thereon. The plaintiffs could not object to the allowance of this payment in the accounts of the surviving executor, and hence they had a right to call on the other executor, Garden, for the amount he had misapplied. It was a part of the estate of Mary Johnson, and in legal contemplation in the hands of Garden. He is, therefore, plainly accountable to the plaintiffs: *Sadler v. Hobbs*, 2 Bro. C. C. 114. The executor, Garden, being accountable for the one thousand dollars paid by him to Robert Brailsford for his legacy, I think he must account for it with interest from the time he paid it to Brailsford.

The legacy and interest was properly paid by the surviving executor. For there can be no pretense that the interest, while it was in the father's hands, was applied to the maintenance of his son. The father made no such charge. Garden can not make it for him. But if this had been contended for by the representatives of the father, it would not have been sustained. For so long as the father was of sufficient ability to maintain his child, it was his duty to do so: *Myers v. Myers*, 2 McC. C. 264 [16 Am. Dec. 648]. There is no proof or assertion that there was any inability to do so. His insolvency probably developed itself after his death.

6. Garden's liability to account for the amount of the sale of the perishable articles, with the interest thereon, results from the view which I have taken of his liability to account for the one thousand dollars. In this respect, however, there are some additional circumstances making it still plainer. He applied

for and obtained the order for sale, and returned the sale bill. Each of these acts he did as executor without even noticing any other person. They cast upon him the burden of accounting for the proceeds of the sale. It was no answer to say that a part or the whole thereof had been received by his co-executor unless he could also have shown that the co-executor received it against his will. This, however, is not pretended, and it follows that Garden's liability is on the clearest principles made out.

7. I think there is no doubt that the late Dr. Garden is liable to the account for waste, both as tenant for life of the whole, and as tenant in common of the remainder in fee. This is not an application to stay waste, but for an account of whatever may have been committed. In general, it may be admitted that one tenant in common can not have an injunction against his co-tenant. But even between them under special circumstances, the court might grant an injunction. As where the waste was destructive to the estate, and not within the usual and legitimate enjoyment: *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 Id. 128. And as in the case of *Hawley v. Clowes*, 2 Johns. Ch. 122, where the tenant in common in possession was cutting down the timber and threatening to persevere. This last case carries the proposition further than I should be willing to sanction: it ought, I think, to be shown that the cutting down the timber was not necessary to the enjoyment of the estate, and would greatly prejudice the interest of the co-tenant. But without dwelling further on a view of this part of the case not necessary to the decision of the point now in dispute, I will proceed to state the grounds upon which the defendant is liable to an account for waste.

In several cases in this state it has been held that a tenant in common may use the estate to the extent of his interest in it: and in the case of *Kerr and Wife et al. v. Robertson*, it was held (by my brethren) that for woodland cut down and cultivated by one tenant in common, he was not liable to account to his co-tenant for rent, but that the remedy of the latter would be for waste. In *Backler v. Farrow* (at the last term in Columbia), it was held that co-tenants who had cut down and worn out a portion of the land much beyond their shares, were liable in equity to account for the waste, and the commissioner having reported a sum certain as to the value of the waste committed, the defendants were ordered to pay it. These cases sufficiently show the right of the plaintiffs to come here against the repre-

representatives of their intestate's co-tenant for an account for the waste by him committed. It only remains to inquire what is waste? and is it made out here? According to the English authorities, cutting down woodland, interspersed as our forests universally are with timber trees, would be waste. But there has been some modification of this rule in this state. Several cases have been decided on the subject—two I recollect pretty well, and will, from memory (as we have no reports of them), state the principles by which they were decided.

In *Milam v. Byrd and Wife*, Mrs. Byrd was tenant for life of her former husband's estate, consisting of a plantation and negroes. It was alleged that her second husband had brought his own negroes on the plantation, and with them and the negroes of his wife that he was cutting down large bodies of the woodland. He was restrained from cutting down the land for the employment of his own negroes; but he and his wife were allowed, with her negroes, to cut down as much land as a prudent man, the owner of the fee, would do in a course of good husbandry. It was made the subject of reference to ascertain the present or future quantity to be cleared. In *Nuckolls v. McKie*, a large tract of land, principally in the woods, was devised to Mrs. McKie for life, and after her death to the plaintiffs. She not only cleared a portion herself, but settled many tenants on different parts of the land. Her tenants were restrained from clearing the land, but she was permitted to cut down and cultivate the land for her own use and support.

These cases leave the rule perhaps still too vague, and do not reach the case of a tenant in common. But when taken in connection with the cases fixing the right of a tenant in common to the use of the estate to the extent of his interest and his liability to account for waste committed, I think we may deduce the rule to be—that where a tenant in common, by cutting down and clearing woodland, beyond his interest, has greatly injured the interest of his co-tenant, he would be liable for waste. And so if the tenant for life cuts down more woodland than is necessary for the enjoyment of his estate, and has injured the remainder, he would be guilty of waste, and liable to the account. It is the ultimate injury done to the rights of the plaintiffs, as co-tenants or in remainder, which gives them the right to complain. For if the clearing of the land had improved its value to the co-tenant or remainder-man, it could not be pretended that still the co-tenant, or tenant for life, would be liable for waste.

It now remains to be considered whether, according to this rule, Dr. Garden was guilty of waste. Under the clauses of the will of Thomas N. Johnson, sen., deceased, already cited, he had a life estate in the land of his wife, Sarah, and according to the construction placed upon the same by the court of equity, he was also entitled to one sixth in fee. There are no words in the will which would exempt him from the impeachment of waste. If it should turn out that there was no cleared land on the plantation when Dr. Garden went into possession, then it is probable that he did not clear more than was necessary to the enjoyment of his life interest, and did not exceed his interest as tenant in common. But, as is most probable from the testimony, there was a cleared plantation sufficient for the employment of the slaves of his wife, in which he also had an estate, for life, then it is clear, that the clearing of sixty acres of woodland in the center of the tract, not leaving timber enough upon the whole land to repair the plantation, and which the witnesses (Nelson and Havin) say was an injury of five hundred dollars, would be waste. But as it may be that the commissioner did not ascertain the precise injury done to the remainder of five sixths in fee by the clearing at the time the life estate fell in, the report will be left open for further examination on this point, under the rules laid down in this opinion.

8. Under the former decree the plaintiffs are plainly entitled to the account of five sixths of the rent of the land, and half of the hire of the negroes. For this bill, although not a bill of revivor, sets out the former decree, and with the immense mass of other matter brought to the view of the court, claims that it should be executed. This was, I think, proper where the bill embraced new matter: if it had barely proceeded on the former decree, then that case ought to have been revived. In taking the account under the former decree, the commissioner must observe that Hext and Mrs. Miles, the adult defendants, are alone liable to be charged therein. They were in possession of the property, and they, not the minor, are properly chargeable.

In making up the accounts against Doctor Garden, the commissioner will deduct, from the eventual balance against him, the amount of four hundred and seventy dollars, which his estate was entitled to receive from Thomas N. Johnson, the younger, under the decree confirming the partition of the land and personal estate of his first wife, Sarah, with interest from the date of the decree of confirmation.

It is ordered and decreed that Chancellor Johnston's decree

be modified according to the views expressed in this opinion; and that the case be remanded to the commissioner, with instructions to restate the accounts according to the principles and directions herein contained: and that the defendants may, by other and additional testimony, discharge themselves; to which the plaintiffs are permitted to reply: and where necessary under this opinion, testimony in explanation of facts of the case which are doubtful upon the former proof, may be received by the commissioner. Let the costs be paid out of the estate of Garden.

JOHNSON and HARPER, JJ., concurred.

Funds held by an administrator who is also guardian of the party entitled thereto, upon a distribution, after the time has expired in which to settle the estate, are presumed to be in his hands as guardian, and the sureties on his administration bond are not liable therefor: *Carroll v. Bosely*, 27 Am. Dec. 470; *Jacobs v. Bull*, 26 Id. 72; *Seegar v. State*, 14 Id. 265.

RELEASES FROM WARD TO GUARDIAN soon after the termination of the relation, or at or before the time of settling the accounts and delivering up the estate, will be set aside as against public policy, without any proof of actual fraud: *Waller v. Armistead*, 21 Am. Dec. 594; *Fudge v. State*, 20 Id. 463; *Say v. Barnes*, 8 Id. 679 and note 683. Guardianship by nature, such as that exercised by father or mother over the child, extends only to the person, not to the property: *Hyde v. Stone*, 22 Id. 583; *Combe v. Jackson*, 19 Id. 568 and note; *French v. Hoyt*, 25 Id. 464; but this is for the benefit of the infant merely, therefore a father or even a stranger may be compelled to account as guardian of the infant whose estate he has enjoyed: *Van Epps v. Van Deusen*, 26 Id. 516.

CO-EXECUTOR'S LIABILITY: See cases collected in note to *Clarke v. State*, 26 Am. Dec. 576.

GIST v. DAVIS.

[2 HILL CH. 335.]

A PLEA OF A FORMER DECREE between the parties, as to the same matters presented by the bill, will not be sustained by proof of a decree in a former suit, wherein the same relief was sought, but which failed owing to a defect in the bill in that suit, which is remedied in the bill now before the court.

THE ADMISSION OF THE RECEIPT OF A CONSIDERATION, expressed in a deed, can not be contradicted, in the absence of circumstances of fraud; but considerations, in addition to that expressed, may be proved.

BOND TO INDEMNIFY, DOES NOT MAKE PRIVY TO JUDGMENT.—Where a bond to indemnify against any judgment that may be obtained upon a certain matter, is given, and where, upon suit brought upon that matter, notice is given to the obligor in the bond to come in and defend, whereupon the obligor does defend the action in the name of his obligee, yet said obligor

is not a privy to the judgment, so as to be precluded from again litigating the same matters, and may therefore obtain, in his own name, an injunction against the judgment, upon grounds that might have been urged in defense to the original action.

IDEM.—THE VERDICT WOULD BE CONCLUSIVE, however, in such action, in favor of the sheriff in a subsequent action by him, upon his bond of indemnity.

BIDDER AT EXECUTION SALE PROTECTED AGAINST PAYMENT OF HIS BID, WHEN.—Where one who had made advances to a manufacturing company, took, for the purpose of securing himself, the outstanding titles to lands of the company, giving a bond to convey to the company upon the discharge of his advances, and afterwards took judgment against the company for the amount of his advances, and caused the lands, of which he held the title, as above stated, to be sold on execution, and thereupon bid in the same for an amount less than that of his judgment, and received a deed of the property from the sheriff, without paying anything, upon giving the sheriff a bond of indemnity, against the consequences of any judgment that might be obtained against him for the amount of the bid, by prior judgment creditors, and afterwards judgment was obtained against the sheriff by prior judgment creditors: held, that said bidder was entitled to an injunction against the judgment.

BILL in equity. Plaintiff, who had advanced money, about four thousand dollars, to a manufacturing company, had taken as security, with the consent of the company, conveyances of the outstanding legal title to land, on which were established works of the company. Plaintiff at the same time gave bond to convey to the company upon repayment made to him of his advances. Afterwards, defendants McDowall & Black obtained from the company, in the name of Davis, also a defendant, a confession of judgment. Plaintiff also later obtained a confession of judgment by the company, but it was entered up at a later date than that first mentioned. The lands of which plaintiff held the legal title, as above stated, were afterwards sold under plaintiff's execution, and were at the sale bid in by plaintiff for two thousand six hundred dollars. The sheriff thereupon executed to plaintiff a deed. No money was paid to the sheriff on this bid, but a bond of indemnity was given him against any sums that he might thereafter be obliged to pay Davis, or McDowall & Black, on said judgment. In a suit against the sheriff in the name of Davis, judgment for the amount of this bid was obtained. Plaintiff now sought to enjoin the collection of this judgment and to obtain a cancellation of the bond given by him to the sheriff. To the bill a plea in bar was put in by McDowall & Black, of a former suit between the parties, in which the same matters were adjudicated. The character of such former suit appears from the opinion.

Herndon and A. W. Thomson, for the plaintiff.

Henry, contra.

HARPER, J. I am sufficiently clear that the plea in the present case can not be supported, whatever may be the merits of the case itself. The rule is unquestionable, that where the same matter has been determined by a decree between the same parties, that will be a bar to a new bill. But then it must appear that the rights of the parties were actually considered and adjudicated. In *Brandlyn v. Ord*, 1 Atk. 571, Lord Hardwicke laid down the rule that where the defendant pleaded a former suit, and the court implied that there was no title where they dismissed the bill, that this was not sufficient; they must show that it was *res adjudicata*, an absolute determination in the court that the plaintiff had no title; and that a bill dropped for want of prosecution is never to be pleaded as a decree of dismissal in bar to another bill: See also, *Pickett v. Loggon*, 14 Ves. 230. If a party by his bill makes out an imperfect case, so that a demurrer would hold, and the bill be dismissed on that ground, I am not aware that this has ever been held a bar, if by a new bill he can make out a good case. In *Child v. Gibson*, 2 Atk. 603, the chancellor said, "every plea that is set up as a bar, must be *ad idem*." As I understand the facts of the case from the opinion of the chancellor, there had been a former bill against the defendant as executor, for an account. The new bill was also for an account, but stating specific facts of the executors having made interest on legacies specifically bequeathed. The chancellor sustained the plea to so much of the bill as sought a general account, but directed it to stand for an answer relative to the demand for interest. He says: "It is extremely hard to say, that because the plaintiff failed in the case which he made on the former account, that now he has made a new case, and brought a new bill, that he shall not be allowed to go on, but be barred by a plea of a former decree in the same matter." So in *Collins v. Gough*, 7 Bro. Par. Cas. 94 (quoted 2 Madd. Ch. 249): "A plea of a former deed for the payment of titles, where a *modus* and the lands alleged to be covered by it, were imperfectly stated, so that the court could not direct an issue, was held not to be a bar to a bill for establishing the *modus*." "Former bill depending pleaded in bar of a second; but the latter had some new matter. Plea allowed with the actual costs; but defendant to answer the second bill, and the former dismissed with

twenty shillings costs:" 2 Bridg. Dig., tit. Lis Pendens, 2, referring to *Crofts v. Wortley*, 1 Ch. Cas. 241. That is to say, the plea was sustained so as to give costs, but the defendant was directed to answer the latter bill which contained the whole case. The cases in which the plea of a former decree has been sustained, such as *Bell v. Read*, 3 Atk. 590, were those in which the case made by the former bill was in every respect the same.

Is the case made by the two bills we are considering the same? The former, after stating the circumstances of plaintiff's claim, the sale of the land by the sheriff, Hunt, the purchase by plaintiff, and the deed executed to him by Hunt, by which he discharged him of the purchase money, without its being actually paid, prays an injunction to restrain McDowall & Black from proceeding against Hunt. In the present bill it is further stated, that upon Hunt's executing the deed to plaintiff, plaintiff promised to indemnify him, and afterwards, in pursuance of his promise, executed a bond of indemnity, on which he will be liable if McDowall & Black's judgment should be enforced against Hunt. Do these make the same case? The chancellor says, in his decree, that "the only difference in the case attempted to be shown by the counsel was, that the bill in the former case did not set forth that N. Gist had actually given a bond of indemnity, but only that he had promised to indemnify. It does not appear to me that this varies the case at all." Now, the former bill of Gist and Hunt does not set forth any promise to indemnify; unless it be meant that from the fact of taking the deed, there resulted a liability to pay the purchase money, from which such a promise would be implied, notwithstanding the acknowledgment of the receipt of the money in the deed. Nor does any such promise appear in any part of the proceedings. The present plaintiff, in his answer to the former bill of McDowall & Black, only says that he "does not remember that James Hunt, the sheriff, ever called on him for the purchase money of said property; but if he had, this defendant would not have paid him, as he was confident that it was due to this defendant under the liens above stated. On the contrary, the former bill of Gist and Hunt was dismissed, so far as respects Gist, exclusively on the ground that he had shown no interest in himself or liability to Hunt, which authorized him to interfere between the other parties, or call for the aid of the court. It is said in the opinion of this court, that "it does not appear so far as the effect of the judgment is concerned, that he needs

any relief. He has both lands and money in his own hands. Hunt made him a conveyance and discharged him of the purchase money, and McDowall & Black may enforce their judgment against Hunt; yet, on principles of law, Hunt can not recover over against Gist." It is added: "To be sure, if as suggested, he has given a bond of indemnity to Hunt, he may be liable on that; not as being bound by the judgment, but as being rendered liable by his own act." The existence of such a bond was surmised in argument, but the quotation shows that it formed no part of the case then made, but was expressly excluded from the consideration of the court. Can it be said that the rights of the plaintiff, if he has any, in consequence of his liability on that bond, were actually adjudicated by the court?

It seemed to be argued, however, on the part of the plaintiff, for what purpose it is difficult to conceive—as if this opinion of the court were erroneous, and that from the facts stated in the former bill, a promise on the part of Gist to indemnify Hunt would be implied.

The deed acknowledges the receipt of the money, and the general rule is unquestionable, that a party shall not be permitted to allege anything in contradiction to his deed. There is a case, however, that of *Sheppard v. Little*, 14 Johns. 310, in which, notwithstanding such an acknowledgment in a deed, evidence was received to show that the consideration had not been paid. The case was that the plaintiff being indebted to a third person one hundred and eighty dollars, defendant advanced the money to pay that debt, and plaintiff assigned to him a lease worth five hundred dollars, upon agreement that he should sell it, reimburse himself, and pay over the surplus to the plaintiff. Defendant sold the lease, but refused to pay over the surplus, and plaintiff, bringing his action, was permitted to show these facts. The determination is rested upon the cases in which evidence has been received to show an additional consideration beyond that expressed in the deed, and those in which evidence has been received to contradict or show a mistake in a receipt. But the authority of that case may well be questioned. In the case of *Curry v. Lyles*, decided by this court, 2 Hill, 404, evidence was received to show a further consideration than that expressed in the deed. But the authorities which establish that such an averment may be made or such evidence given, go upon this—that it is not to contradict the deed, but is consistent with it. The principle is explained in *Mildmay's*

case, 1 Co. 176, that if no consideration be expressed, yet a consideration may be shown; or, if it be said, for divers considerations, a particular consideration may be averred; or where, as in the case of *Villers v. Beamont*,¹ there quoted, a money consideration was expressed, it might be shown that the deed was also in consideration of marriage; because, as is said, "although there was a particular consideration mentioned in the deed, yet an averment in the same case might be made of another consideration, which stood with the indenture and was not contrary to it." See also the cases on the same subject, collected by Phillips, in his treatise on evidence, 424 *et seq.* There is no English case determined on any other principle, unless upon charges of fraud, usury, etc. But, can it be said that when a party acknowledges the receipt of money by his deed, he does not contradict the deed by showing that the money was not received?

Then, as to the cases respecting receipts: A receipt is not a contract; it is merely an admission of a fact; and if the fact be not true, the party is not estopped to show the truth by writing merely. But is there any doubt but that a party is estopped by that which he recites or admits in his deed? The decision in *Sheppard v. Little* seems not to be sustained by authority or reasoning; though it strikes me that the case might, perhaps, have been rightly determined on the score of the defendant's fraud. But admit the authority of that case in the fullest manner. An express agreement was proved that the defendant was to sell the lease and pay over the surplus. But suppose no such agreement had been shown, and nothing had appeared but the mere facts that defendant had advanced the one hundred and eighty dollars and received a transfer of the lease, for the expressed consideration of five hundred dollars acknowledged to be received. Could the court have implied the agreement? There is nothing in the case or in any other case to warrant it. I suppose, in the case before us, that the sheriff, Hunt, knowing the facts, and taking upon himself to know the law, and being satisfied that Gist was entitled to the money, executed the deed, intending to discharge him and take upon himself the risk of being made liable to McDowall & Black. On what principle could the court imply a promise to indemnify on the part of Gist? But this was the precise case, as it appeared from the pleadings and evidence on the former bill. Nothing was shown but the purchase and the execution of the deed acknowledging the receipt of the consideration; and in the

1. 2 Dyer, 146.

absence of any showing to the contrary, parties must be supposed to have intended what they have done. It may be further observed, that if any promise could be implied, it would not be a promise to indemnify, as the chancellor supposes, but to pay the money; but could we imply such a promise in contradiction to the express statement, that he claimed the money as his own (of course with Hunt's knowledge) and would not have paid it if demanded?

I conclude, therefore, that the plaintiff has made out a new case by his present bill; that he is not bound by the former decree, and that the plea must be overruled.

And here I might properly stop—the plea being the only matter now before us. But the whole merits of the case (about the facts of which there does not appear to be any dispute) were fully gone into, and it may save litigation and expense, that the views of the court should be expressed. Of course, if there is any misconception of facts, the parties will not be concluded.

It is said in the former opinion of the court, that although the sheriff, Hunt, is concluded by the judgment at law, yet Gist is not concluded, not having been a party to the suit. None but parties or privies are bound by a judgment. As the case then appeared, he would not be regarded as privy. A question arises, whether by giving the bond of indemnity, as is now shown, he did not make himself privy, so as to be bound; especially if he had notice to defend the suit (of which there seems little doubt), as well as that he did in fact defend it. But before going into that question, I shall consider the case as it would stand if there were no such judgment, or as if the suit at law were still depending. It is held in the former opinion of this court, that if the purchase money had been actually paid over to the sheriff, the plaintiff would have been entitled to it; and I refer to the reasoning of that opinion for the grounds of the conclusion. And he would have been entitled to it on equitable principles, and might have sustained a suit in equity for it. It is true, he might have brought an action for money had and received, but that action is in the nature of a bill in equity. It would have been a case of concurrent jurisdiction, and he might have chosen his jurisdiction. So, if the sheriff had paid over the money of his own accord to McDowall & Black, the suit might have been maintained against them. A man may recover his money from any one into whose hands it may come. And it would have been immaterial if the money had been recovered of the sheriff by suit. There would, then,

have been no ground for regarding Gist as privy to the suit, or estopped by the judgment to show a preferable title to the money. And if such a suit had been brought, he might have brought his bill against both parties to enjoin it and establish his own claim to the money. But instead of paying the money, he gave the bond of indemnity. If the suit at law were still depending, he would have precisely the same ground of equity (or a clearer one as being liable on the bond of indemnity) to enjoin that suit and establish his own claim. And this right he still has, unless the judgment at law must be regarded with respect to him as *res adjudicata*.

I come, then, to inquire if, as I suppose, the present plaintiff had notice of the suit at law and was in truth the real defendant, whether he is estopped by the judgment. And certainly it should seem that he ought to be so bound. Certainly the plaintiff does not appear to come within the reason of the rule which declares that none but parties are bound by a verdict or judgment—that he had not an opportunity to give evidence or cross-examine witnesses. It is essential to the just administration of law, that no one should be condemned without having an opportunity of being heard. But it is an equally well-settled principle, and necessary to the peace of society, that when he has once been heard, he shall thenceforward be silent; that what he has once had an opportunity of litigating before a tribunal of competent authority, he shall not bring into question again. Where a party has had an opportunity of defending himself fully at law, equity will not relieve: *Winthrop, Todd & Winthrop v. Survivors of Lane, Son & Fraser*, 3 Eq. 324, 325 and note; *Maxwell v. Conner*, 1 Hill Ch. 22.

It was urged with some degree of pertinacity, by the counsel on the part of the plaintiff, that the proper defense was offered to the court of law and rejected, and that this forms a ground of relief. But this seems to be contrary to the fact, as appears from the report of the presiding judge, made to this court on the trial at law, and as is now stated by the same judge. Evidence was offered to show that the title of the land was in the purchaser, Gist; but, as determined in that case, this would not have been a defense. In *Maxwell v. Connor*, the defense had been offered at law and rejected, and it was held to have been the defendant's laches that he did not appeal. But certainly there was no such ground of appeal in the case at law of *Davis v. Hunt*. The ground of appeal taken (see 2 Bail. 415), "that the presiding judge erred in rejecting evidence that the Weavers

had neither right, title, nor interest in the land sold by defendant," is inconsistent with any such defense having been offered. The very ground of the defense was, that the Weavers had an equitable interest in the land to compel a sale of it, and this alone constituted Gist's title to the money. My own impression on the case at law was, that Gist's title was absolute, and that as a matter of indulgence to the Weavers, he had consented to a resale, to afford them the chance of an enhanced price, being ignorant that the judgment of McDowall & Black had been entered previously to his own, so as to entitle them to the money.

But I feel constrained, on authority, to come to the conclusion, that although in point of fact we may be satisfied that Gist was the real defendant at law, yet, in a legal point of view, he can not be so considered; but that we must regard that judgment as *res inter alios acta*—in effect, that this is a case in which he has a right to be twice heard.

There is no question respecting the general rule, that none but parties and privies are estopped by a verdict or judgment. Who are privies? According to Coke, 1 Inst. 352 a, there are "privies in blood, as the heir; privies in estate, as the feoffee, lessee, etc.; and privies in law, as the lords by escheat; tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the *post*." All persons claiming in any manner under either of the parties, will be regarded as privies. "Hence the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, or the judgment of the court on facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers:" *Per De Grey, C. J.*, in *Duchess of Kingston's case*, 11 Stat. Tri. 261. Now, can Gist be regarded as claiming under the sheriff, Hunt? The latter was merely a stakeholder, for the person entitled to the money. I may observe here, that the giving of notice to defend the suit, has nothing to do with determining whether the parties were or were not privies. That relates to another matter, which I shall hereafter consider. If one should come by finding into the possession of a chattel, which was claimed by two other persons, and being sued by one, should defend himself by setting up the title of the other, a verdict against him would be no evidence against the other claimant, in a subsequent suit for the same chattel; and though he had given him notice to defend his title, this

would be supererogatory; he would still be a stranger to the first suit.

There is a class of cases in which verdicts have been held to be evidence, and sometimes conclusive evidence, against persons neither parties to the suit nor privies. As in the case of *Green v. The New River Company*, 4 T. R. 589, where a master had been sued and damages recovered against him for the neglect of his servant, it was held by the court that the verdict would be evidence in an action by the master against the servant, not as to the fact of the injury, but the quantum of damages. This case is said by Philips, page 228, to be no exception to the rule which forbids a verdict to be evidence against any but parties or privies. The verdict was not *res adjudicata* as to the servant, but constituted or evidenced the very damage which the master had sustained. But the other party would have nothing to do with this. He might sue both master and servant; but a verdict for or against one would be no evidence in an action against the other. So in the cases in which a vendee, being sued for property, gives notice of the suit to the vendor who has warranted his title. Here the very undertaking of the vendor is to defend the title, and his failure to do so when notified, constitutes of itself the cause of action. So, where the surety to a note being sued, gave notice to the principal to defend the action, the verdict was held to be conclusive in an action against the principal by the surety. Here the implied contract between the principal and surety was, that if the latter should be compelled to pay the money, the former would reimburse him, and the judgment by which he was compelled to pay, went to make up the cause of action. But though the principal had had notice of the suit, and had in fact defended it and failed, the verdict would have been no evidence in a subsequent suit by the payee against the principal. Here the principal would have been twice heard. So, in the case before us, if Hunt gave Gist notice of the suit at law, the verdict would be conclusive in a suit by him on the bond of indemnity against Gist, as being itself the cause of action. But this does not make it evidence in a suit between Gist and McDowall & Black.

The case of *Kinnerley v. Orpe*, Doug. 517, seems to be in point. In that case, the plaintiff had recovered in an action for trespass on a fishery against a servant of C. In another action against another servant of C., who committed the trespass by C.'s command in order to try the right, the former verdict was offered in evidence and received by Baron Perryn,

who held it to be conclusive. But on a rule for a new trial before the king's bench, though the cause went off on another point, the court thought the evidence admissible, though not conclusive. Here certainly then was the same real defendant, though not the same nominal one, in both actions. In commenting on that case, however, in *Outram v. Morewood*, 3 East, 366, Lord Ellenborough says: "It is extraordinary that it should have been for a moment supposed that there could be an estoppel in such a case. It was not pleaded as such; neither were the parties in the second suit the same as those in the first. The doubt seems either to be, whether the former record in the action of trespass was at all admissible in evidence upon the subsequent action against the defendant, who was not a party to the former action, rather than as to any conclusive effect which it could have had." He evidently inclines to the opinion that it was not admissible, and indeed it is difficult to reconcile its admissibility with the acknowledged general rule on the subject. But if we regard the judgment as admissible in this case, yet if it be not conclusive, I think Gist's title to the money very clear on the reasoning of the former opinion of the court. Regarding the plaintiff then as not having been a party to the suit at law, nor bound by the judgment, but coming properly and for the first time to establish his claim, he has made out a clear case for relief. But though we have held that Hunt is concluded by the judgment at law, yet we can not afford Gist the relief to which he is entitled, without relieving him also. If the judgment of McDowall & Black were enforced against him, he would be plainly entitled to recover against Gist. If the judgment be not conclusive against Gist, it is as if the action were still depending; in which case he would have the clearest equity to enjoin it. The judgment must therefore be enjoined. I am better satisfied to arrive at this result, as it seems to meet the true merits of the case.

The plaintiff, however, must pay the costs. The present suit has been rendered necessary by his neglect in failing to make out a proper case by his former bill. It is true that he states the bond of indemnity to have been out of his possession, and only recovered since the filing of his present bill; but he knew of its existence; it does not appear but that with proper diligence he might have found it before; or if he could not, that he might not have established its existence, contents, and loss. The former bill says nothing of the bond, nor does it charge

any liability to Hunt, which was the plaintiff's only ground of equity.

It is ordered and adjudged that the decree of the chancellor be reversed, and the defendant's plea be overruled.

JOHNSON, J., concurred.

O'NEALL, J., dissenting. I dissent from this opinion on every ground assumed to give the plaintiff relief. My concurrence in the former opinion in equity was altogether in the result, not in the principles or reasoning by which my brother Harper established Gist's right to sell and obtain the benefit of Weaver's equitable estate in the manner in which he did. The case of *Davis v. Hunt*, 2 Bail. 412, was decided correctly. The principle laid down in it, "that only the defendant's interest in the land, whatever that might be, was sold in the present instance, and if the purchaser bought his own land it was his own folly," is good law, and it does not cease to be good, when equity is called on to administer it. That principle excludes Gist, as I think, from relief both at law and in equity. The plea in law is, I think, good: the very matter now decided was, as I conceive, adjudged in a contrary way on a former bill. That the judgment at law is conclusive against Hunt; is admitted: it is also admitted that if he was compelled to pay that judgment, he could sue Gist on his bond of indemnity, give the recovery in evidence, and compel him by the judgment of a court of law, to pay the recovery in *Davis v. Hunt*. If this does not make Gist a privy in law, I confess I do not know what would. He stands exactly as Hunt does, and is concluded.

C A S E S
IN THE
SUPREME COURT
OF
TENNESSEE.

HAMILTON v. BISHOP.

[8 YERGER, 33.]

GIFT TO A WIFE'S SEPARATE USE is sufficient if the words used denote an intent to exclude the husband from control over the property, or are incompatible with an intent that he should have such control. Technical language is not absolutely necessary.

DEED CONVEYING A SLAVE TO A WIFE "AND THE HEIRS of her body * * * to the use and benefit" of the wife and her children, "to remain in the possession" of the said wife, "for the use and support of said children forever," is sufficient to vest the property to the wife's separate use.

INTERVENTION OF A TRUSTEE IS UNNECESSARY to support a gift to a wife's separate use, for the husband will be constituted a trustee.

REGISTRATION IS UNNECESSARY to sustain a deed to a wife's separate use against the husband's creditors.

BILL to recover a negro woman. The plaintiff claimed the said negro under an unregistered deed from her father, which, she insisted, conveyed the said negro to her separate use, she being at that time the wife of Andrew Hamilton. The language of the deed, so far as material, is stated in the opinion. The defendants claimed under a mortgage from Andrew Hamilton, now deceased, to secure debts due them. The property had been sold under the mortgage, and purchased by one of the defendants. The chancellor dismissed the bill, holding the property to have been absolutely vested in the husband.

George S. Yerger and Clayton, for the complainant.

Wm. Thompson, for the defendants.

By Court, **GREEN, J.** It is contended by the defendants, and

so the chancellor decided, that this deed vested the property conveyed by it absolutely in Andrew Hamilton, the husband of Elizabeth; and the first question for our consideration is, what is the true construction of this deed.

Whether this is an absolute gift, by which the right to the property is vested in the husband, or a gift to her separate use, whereby the marital right of the husband was excluded, must depend upon the intention of the donor, to be collected from the language he has employed. For if the father intended the property to be held as a separate estate, the court will carry that intention into effect: 2 Kent Com. 165; Clancy, 251, 288; *Elam v. Morgan*, 5 Yerg.¹ In order to vest the property to the separate use of the wife, it is not indispensable that technical language should be employed; it is enough, if there are any expressions denoting an intention to exclude the husband, or which are incompatible with the idea, that the donor intended that the husband should exercise dominion over it: Clancy, 262. A variety of expressions are enumerated by Mr. Clancy, pp. 263, 268, which will be considered a sufficient expression of the intention. As, if the words used are, "to be at her disposal;" "for her own use;" or "that she shall enjoy and receive the rents and profits;" any of these expressions being deemed equivalent to the words, "sole and separate use." The words used in this deed are, "to the use and benefit of the said Elizabeth and children, and to remain in the possession of said Elizabeth, for the use and support of said children forever." These words control and limit the meaning of the expressions before used: "I give to the said Elizabeth and the heirs of her body," so as to point out the particular purpose for which the property was given, and in our view are equivalent to the words, "sole and separate use." How can the property be for "the use and benefit of the said Elizabeth and her children," and to remain forever in her possession for that use, unless the marital right of her husband be excluded? From hence, therefore, we must infer, that the father intended such exclusion. In the case of *Johnson v. Thomson*, 4 Desau. 458, the court said, that although the deed was not explicit, yet as the intention might be inferred, that it was to be held for the separate use of the wife, it was sufficient. Such intention we think plainly inferable from the language in the deed before us. It must be regarded, therefore, as a conveyance for the separate use of Elizabeth Hamilton and her children; Andrew Hamilton, the husband, taking no interest therein, and having no power to mortgage the slave for his debt.

2. The next question is, can a wife have a separate property in an estate which is conveyed to her directly, without the intervention of a trustee?

Chancellor Kent says, 2 Kent Com. 162: "If property be settled to a married woman's separate use, and no trustee be appointed, the husband will be considered as such, notwithstanding he was not a party to the instrument under which the wife claims." Clancy on the rights of married women, pp. 15, 30, holds the same doctrine, and it may be considered now as settled beyond question, that it is not essential to the validity of a conveyance of property for the separate use of a wife, that a trustee be named in the deed, but that the husband will be constituted a trustee.

3. It is insisted, that this deed should have been registered, and this not having been done, the deed is void. This question is settled upon authority that we may not now question. The supreme court of the United States, in the case of *Pierce v. Turner*, 5 Cranch, 154, decided, upon the construction of the Virginia statute, which is similar to ours, that the act applies only to the creditors of the grantor. That case was followed by the court of appeals of Virginia, in the case of *Land v. Jeffries*, 5 Rand. 311; and the authority of these cases was held to be decisive of this question, by this court, in *Morgan v. Elam*, 5 Yerg. 449.¹ Therefore the decree will be reversed, and a decree for the complainant.

Decree reversed.

GIFT TO WIFE'S SEPARATE USE, what necessary to make valid and effectual: See *Carroll v. Lee*, 22 Am. Dec. 350. A bequest to the testator's married daughter, with a limitation to the heirs of her body, in case of her death, does not indicate an intention to limit the bequest to her separate use, and the property bequeathed will be subject to the husband's marital rights: *Krause v. Beitel*, 23 Id. 113. Technical language is unnecessary to make such a gift; it is enough if the donor manifests a clear intention to exclude the husband's marital rights with respect to the property given: *Beaufort v. Collier*, 6 Humph. 490; *Somers v. Craig*, 9 Id. 469; *Gray v. Robb*, 4 Heisk. 76; *Bowers v. Bowers*, Id. 298, all citing and approving the principal case on this point. But the intention to exclude the husband from all control over the property must be clearly apparent: *Thompson v. McKisick*, 3 Humph. 633; *Woods v. Sullivan*, 1 Swan, 509; *Meredith v. Owen*, 4 Sneed, 228; *Irwin v. Chrisman*, 2 Coldw. 505; also recognizing *Hamilton v. Bishop*, as an authority on this subject.

THAT REGISTRATION WAS UNNECESSARY to protect a conveyance to the separate use of a *feme-covert* from the creditors of her husband, under the act of 1785, is a point to which the principal case is cited in *Baldwin v. Baldwin*, 2 Humph. 484.

KING v. VAUGHAN.

[8 YERGER, 59.]

BILL DOES NOT LIE TO CORRECT A MISTAKE IN A DECREE whereby a larger sum is given than the court intended, the party aggrieved having an adequate remedy by a direct application to the court, or by appeal, or certiorari.

BILL filed by King to correct a mistake in a decree against him. The circuit court granted the relief prayed for, and the defendants appealed. The opinion states the case.

Wm. Thompson, for the complainant.

A. M. Clayton, for the defendants.

By Court, CATRON, J. King was guardian to Eliza Jenkins; the county court removed him, and appointed Vaughan. The latter filed his petition, pursuant to the twenty-third section of the act of 1762, c. 5, bringing King to an account before the county court of Montgomery, and to obtain the moneys of the ward in his hands. A regular decree was had for two hundred and seventy-six dollars. King took no appeal, but when the execution issued against him, he filed his bill in equity in the circuit court, enjoining the decree in the county court, alleging, that the decree of that court was for seventy-two dollars too much, and so entered by mistake. The ward, and guardian, Vaughan, answered the bill, denying the mistake. Depositions were taken and the cause heard: the circuit court corrected the mistake, supposed to have been proved, and gave relief for the seventy-two dollars, by decree, from which the defendants in equity appealed to this court.

The bill is filed merely to correct a mistake, alleged to have been committed in entering up a decree on a proceeding, of which the county court had jurisdiction; it does not seek to reinvestigate the accounts between the former guardian and his ward, but to establish by parol proof, that the decree of the county court was entered for a larger sum than the court intended it should be entered for.

The proceeding in the county court was neither strictly legal nor equitable in its nature, but partaking of the character of both; this matters nothing—its effect is the same. In personal actions, concerning debts, goods, and chattels, a recovery or bar in one action is a bar in another, and there is an end of the controversy: 8 Rep., preface; 3 Wils. 304;¹ Swift Ev. 11; 3 East, 851;² *Estell v. Taul*, 4 Yerg. 469 [24 Am. Dec. 498].

1. *Kitchen v. Campbell*.

2. *Outram v. Morewood*.

This court has often holden, and nothing is better settled than that "a party will not be aided by a court of chancery after a trial at law, unless he can impeach the justice of the verdict on grounds which he could not have availed himself of at law, or was prevented from doing it by fraud or accident, or the act of the opposite party unmixed with negligence or fault on his part:" 3 Yerg. 99,¹ 127.² In the causes reported by Yerges, the defendants answered the bills, took proof, and went to a hearing, yet the court held, that the matter having been tried at law, equity could assume no jurisdiction to reverse the judgments at law: courts of equity can not act as courts of error, but must proceed upon grounds of jurisdiction, original in their character, and not as revising tribunals. Were this allowed and jurisdiction assumed to adjudge upon matters that had been heard, or might have been heard, and determined in a court of concurrent jurisdiction (as the county court was in this instance), because the complainant failed in his cause, or did not see proper to bring forward his whole cause, litigation would be endless, as was holden in *Peeler v. Norris*, 4 Id. 337.

King could have availed himself in the county court of the grounds of relief he sets forth in his bill. If a mistake was committed in entering up the decree, for too much, he could have applied to the court and had it corrected, or appealed, or taken up the cause to the circuit court, by certiorari, if defeated of his appeal: of every ground on which relief is sought, the complainant could have availed himself by the ordinary remedy, and by ordinary diligence—having failed to do so, he is concluded by the judgment of the county court, and can not be heard in chancery.

The same cause can not be twice tried, as an original cause; a court of equity must proceed on original jurisdiction; having none in this case, power was wanting to enter the decree made by the circuit court. In such cases, objections to the jurisdiction may be made at any time, notwithstanding the defendant has answered and gone on to a hearing. It is not like a case, where a bill seeks to litigate a matter, where it is very doubtful if it be not of exclusive legal cognizance. There the court will not be astute to inquire or search for grounds to dismiss the bill of the parties, on the pleadings and proof, where the parties have come to a final hearing on the facts. But the matter having been tried by a court of competent jurisdiction, it is concluded, and another tribunal has no power to rehear it;

1. *Thurmond v. Durham*.2. *Kearney v. Smith*; 8. C., 24 Am. Dec. 580.

public policy forbids the second tribunal to act, independent of the conduct of the parties to the cause, grounded on the maxim, that there must be an end to litigation. The controversy being closed by the judgment, the record is conclusive, and estops the court from contradicting it by another decree, unless the judgment be set aside for fraud in obtaining it, or because the matter of defense could not be heard at law, and, in fact, the controversy had not been, and could not be tried at law. Here there was no attempt to set aside the judgment of the county court, but the complainant asked to have it reformed, and it was so done. A re-examination of the accounts was not had in the circuit court, on hearing of the bill, but parol proof heard to show the county court intended to decree seventy-two dollars less than the record shows was decreed. Such evidence was unprecedented and inadmissible; it directly contradicted a record. No proof could be heard to sustain the bill, which we order to be dismissed, at the cost of the complainant, here, and in the court below.

Decree reversed.

EQUITY CAN NOT RELIEVE AGAINST JUDGMENTS CAUSED BY THE MISTAKES OF negligence of parties or their counsel: *Yancey v. Downer*, 15 Am. Dec. 35; *Risher v. Roush*, 22 Id. 442. So, though the mistake was due to the suggestion of the court: *Risher v. Roush*, *supra*. The previous cases in this series relating to the power of equity over judgments at law generally, are collected in the note to the case last cited. See also the note to *Oliver v. Pray*, 19 Id. 603, where the subject is discussed at length, and *Kearney v. Smith*, 24 Id. 550, and the note thereto, referring to a number of Tennessee decisions on this point, including *King v. Vaughan*. See also *Haughy v. Strang*, 27 Id. 648.

BANKS AND HOUSTON v. MITCHELL.

[8 YERGER, 111.]

CONTRACT BETWEEN TWO FIRMS HAVING COMMON PARTNER.—Where the same person is partner in two firms, and a note is made by one firm to the other, an action can not be maintained thereon by the latter firm against the partner in the other, who does not belong to both firms.

ACTION on a note. The opinion states the facts.

H. A. Garrett, for the plaintiffs in error.

V. D. Barry, for the defendant in error.

By Court, CATRON, C. J. Mitchell and Banks were partners in trade, and Banks and Houston were also partners in another firm. The firm of Mitchell & Banks executed to Houston and

Banks their negotiable bill single, for one hundred and eighty-two dollars. Houston and Banks sued Mitchell on the note, who pleaded in bar, that Banks was one of the obligors, as well as obligee and plaintiff; the plea was demurred to, and the demurrer overruled in the courts below.

Where there are several obligees, they are deemed in law as one person, and must jointly sue as plaintiffs. This suit is the same, therefore, as if Banks had sued alone, and had Houston died this must have been the fact. So at common law, joint obligors held the same relation, and could not be sued separately; they were jointly bound to the obligees, and bound to each other: 1 Chit. Pl. 28.

For the sake of the remedy, the common law, as to obligees and defendants, has been altered, and by our statutes of 1789, c. 57, and 1813, c. 67, they may be said to be sued as on a joint and several obligation; still the contract is equally joint as between themselves, as it was before the passage of the statutes, and if one joint obligor be sued and judgment recovered against him, he may immediately on motion have judgment over against his co-obligor for half the debt.

In England, where an obligor or maker of a note or bill, is also an obligee or payee, no suit at law can be maintained, and the reason given is, not that obligors must be jointly sued, but because one can not contract with himself; and the plea to such action is not in abatement, but in bar: *Mainwaring and others v. Newman*, 2 Bos. & Pul. 120. In substance and effect the contract continues with us the same, as it was at the common law, and were this suit allowed to proceed, we would have two actions at law, and then to do justice amongst the parties, the same proceeding in equity would be necessary to enforce the contract in its true sense, as in the first instance. Suits at law being useless and vexatious in such cases, and not calculated to execute the contract, can not be maintained. From the face of the paper, Mitchell and Banks would be ordered in equity to pay one moiety each to Houston and Banks; then the latter would divide the amount, and Banks retain his half of the money. The effect would be, that Mitchell would have paid Houston one half of the debt. But these persons being partners in trade, constituting different firms, and having bound themselves in this capacity, a decree applying partnership effects would be required, and is a strong reason for sending the parties to equity.

Judgment affirmed.

SAME PERSON CAN NOT BE OBLIGOR AND OBLIGEE in the same contract, or plaintiff and defendant in the same action: *Allin v. Shadburne*, 25 Am. Dec. 121 and note. In *Woods v. Ridley*, 11 Humph. 194, it was laid down, citing *Banks v. Mitchell*, that where a single bill was executed by several obligors and made payable to the order of one of them, he could not sue upon it, because, being a joint maker, he could not sue himself, nor could he sue the other obligors; but it was further held that upon his negotiating such bill it was valid in the hands of his indorsee against the other obligors.

MITCHELL AND WIFE v. BEAL.

[8 YERGER, 134.]

DEBTOR MAY PREFER CREDITORS, but not so as to delay other creditors by conveying as security to a particular creditor a larger amount of property than will satisfy the debt, and unreasonably postponing its appropriation.

DEED OF TRUST CONVEYING MUCH MORE PROPERTY THAN NECESSARY as security for a balance of a debt, and providing that the debtor shall retain possession for three years before selling to satisfy the debt, is fraudulent and void as to other creditors, although it appears that certain goods of the debtor shipped by the creditor, the proceeds of which are intended to apply to the debt, have not been heard from, and that if such proceeds are not so applied, the amount of the debt will be considerably increased.

BILL by creditors of Wilson and Harman to set aside a deed of trust executed by them when in failing circumstances, to secure a debt due to one Beal. The debt was nominally six thousand five hundred and eleven dollars, for which judgment had been confessed, but only four thousand one hundred dollars was really due, if the proceeds of certain cotton of the debtors shipped by Beal, and which had not since been heard from, should be applied to said debt as intended; but if not so applied, the amount of the debt would exceed six thousand five hundred and eleven dollars. The property, consisting of land and negroes, conveyed by the deed of trust, considerably exceeded the amount of the debt, and the deed provided that the debtors should retain possession for three years. Decree in favor of the complainants, and the defendants appealed.

A. Hunstman and J. McKernon, for the complainants.

Martin and McClanahan, for the defendants.

By Court, GREEN, J. Upon the facts of this case, the question is, whether this deed of trust can be supported, as fair and legal. We think it can not. It is true, a debtor may prefer one creditor, and pay and secure his debt, though others may

suffer loss; but he can not cover a much larger amount of property than will satisfy such debt, and postpone, for an unreasonable time, its appropriation. By such act, he would hinder and delay other creditors; and, therefore, the deed by which he would attempt to do so would be void by the statute. Other creditors have a right to the appropriation to the payment of their debts, of all the property which may be included in such deed, over and above that which may be necessary to satisfy the debt secured by the deed. If in the deed it be stipulated, that the sale of the property shall be postponed for several years, all other creditors are, of necessity, delayed until the expiration of that time, should the deed be permitted to stand. For, if it be good for any purpose, it must be so for every purpose, and the stipulation as to the time which may be given, is obligatory upon all who may be concerned. The slightest reflection will enable every one to perceive, that in such case other creditors would be delayed and hindered, in having any surplus which may remain after the payment of the debt secured by the deed, applied to the satisfaction of their debts.

In the present case, the unusual time of three years is given for the payment of the money, before any sale is to take place. The creditors of Wilson and Harman are to wait all that time, before they can ascertain whether there will be any property to apply to the payment of their debts, after the extinguishment of Beal's. If the statute has any meaning, a deed like this must be within its provisions, and to be considered as fraudulent. Not that it is to be supposed, that Mr. Beal had any bad purpose of heart in reference to other creditors; but we are to look at the effect of this deed upon the rights of other creditors; and the law supposes, that parties intend that which is the legitimate offspring of their acts. But it is insisted in the argument, that as there were one hundred and fourteen bales of the cotton belonging to Wilson and Harman, which had been shipped by Beal, and which he had not heard from, he was entitled to have taken judgment for the whole amount of his advances to them, without allowing any credit for the one hundred and fourteen bales; in which case they would have been his debtors for a much larger sum than the six thousand five hundred and eleven dollars; and that he would have had a right to have included in his deed of trust, a sufficient amount of property to have secured the whole sum thus due him.

Should this argument be admitted in its full force, still the objection to the postponement of the disposition of the prop-

erty so included, for three years, remains in its full force. The one hundred and fourteen bales of cotton were in Beal's hands, and it was intended, that its proceeds should be applied to his debt. He knew, therefore, that when he should receive an account of its sale, that his debt would be extinguished by the amount it might produce, and thus leave a large amount of property covered by the deed, to secure a debt greatly under its value. In this there would be nothing wrong, had the time limited for the disposition of the property been short, so as that the surplus above a security for his debt could have been applied to the claims of other creditors. But when to secure a large debt a man's whole estate is covered by a deed, although it may not greatly exceed in value the debt to be secured, yet if three years be given, during which the property is to remain undisposed of, and to continue in the possession of the grantor, other creditors, who may be entitled to the surplus which may be created by partial payments of the debt secured by the deed, are hindered and delayed in the enforcement of their claim to such surplus. It can not be disguised, but that this must have been the intention of Wilson and Harman. The unreasonable time given, within which to pay the debt, during all which period their other creditors were kept from seizing their property, gave them an opportunity of appropriating its proceeds, in a way to defeat, as well as hinder and delay, those to whom they were indebted.

The mere fact that Wilson and Harman retained possession of the property, is not fraud *per se*, nor, in a mortgage, is it *prima facie* evidence of fraud, if the time given for the payment had been reasonable; such, for instance, as would have been equivalent to the probable "law's delay." The possession was consistent with the deed, and as a fact of itself, would not constitute a ground for setting aside the deed. But the delay, so greatly beyond the time it would have required for Beal to have obtained judgment and levied an execution, is a fact, coming so directly, in its effect, within the words of the statute, that it is impossible to support a deed with such a provision.

The decree of the chancellor will be affirmed, and the clerk and master of this court carry the same into execution.

Decree affirmed.

PREFERENCES TO CREDITORS.—For an extended discussion of this subject, see the note to *Crawford v. Taylor*, 26 Am. Dec. 584. See also, *Sommerville v. Horton*, Id. 242; *State v. Bank of Maryland*, Id. 561; *Dulaney v. Hoffman*, 28 Id. 207, and other cases in this series cited in the notes to those decisions. A deed of trust conveying certain personalty to a creditor of the

grantor to secure payment of his debt, which provides that twelve months shall elapse before the property is sold to pay the debt, and that during that period the debtor shall remain in possession of it, is not illegal, especially when the debt of such creditor largely exceeds the value of the property: *Sommerville v. Horton*, 28 Id. 242. In *Hardin v. Osborne*, 60 Ill. 103, it is held, citing the principal case, that an unreasonable postponement of the time of sale in an assignment preferring creditors would avoid it. But a stipulation for reasonable delay before the sale, such as would not exceed the law's delay, will not render a deed of trust fraudulent: *Gimell v. Adams*, 11 Humph. 285, also citing *Mitchell v. Beal*. In *Rindskoff v. Guggenheim*, 3 Coldw. 284, it was held that an assignment by a failing debtor of all his estate, preferring certain creditors and vesting the immediate possession in his trustee, but delaying a sale for thirteen months, should not be set aside on that ground. The mere fact that a credit of one, two, or three years is given upon a sale of land by one who is indebted will not of itself render the sale fraudulent: *McCasland v. Carson*, 1 Head, 118, citing and distinguishing *Mitchell v. Beal*.

So, where a deed of trust, covering less property than the amount of the debt secured, and not including the debtor's whole estate, gave the debtor five years to pay a debt of one hundred thousand dollars, but provided for annual payments of twenty thousand dollars each, with interest, in default of which the trustee was to sell, such deed was held not fraudulent on its face: *Bennett v. Union Bank*, 5 Humph. 612. Said Reese, J., delivering the opinion in that case: "If the excess in the value of the property over the debt were considerable and the time of indulgence long, the evidence of a fraudulent purpose on the face of the instrument would become greater, and that evidence would become more and more pregnant in proportion as the excess in value was increased and the time of indulgence prolonged. These are the two elements, conjointly operating, which mainly entered into the consideration of the court and controlled its decision in the case of *Mitchell v. Beal*, 8 Yerg. 134. That case was properly decided upon the facts shown in that record; but that case differs from this greatly. All the property of the debtor seems to have been included. That property was twice the value of the debt secured; the time of indulgence was three years; no annual payments stipulated for; the possession and use of the property for that time expressly reserved to the debtors, and put beyond the control of the trustees, and power given them to sell it on a credit of three years, with no other restriction but that they should pay the proceeds to the trustee; and there was a further advance by the creditor to the debtors. But here the debtors left out of the deed a large portion of their means, from which fifty thousand dollars have been realized by other creditors. The value of the property not only did not exceed the amount of the debt, but fell short of their entire debt forty-five or fifty thousand dollars, and fell short of the debt named in the deed thirty or thirty-five thousand dollars. The annual payment of twenty thousand dollars is required, with the interest on the residue, in default of which the property was to be sold. So we can not say, looking to the face of the instrument, that we see in the deed a purpose to hinder or delay other creditors, or that its legal effect would have been wrongfully and improperly to have done so."

BROWN v. McDONALD.

[8 YERGER, 158.]

RELEASE OF SURETY.—Where, on a judgment against the principal on a bond and his two sureties, an execution is levied on property of the principal sufficient to satisfy the judgment, but the property is released by the execution of a delivery bond by the principal and one of the sureties together with other parties, the other surety refusing to join therein and desiring the sheriff to proceed, the latter is discharged, and is not liable for contribution to his co-surety, who, after forfeiture and judgment on the delivery bond, pays the whole amount of the judgment.

BILL filed by Thomas Brown against McDonald, as co-surety with the plaintiff on a certain bond, to compel a contribution of one half the amount of said bond. It appeared that the bond referred to was executed by one Lewis Brown with the plaintiff and defendant as sureties, and that the same was subsequently assigned to E. Webb & Co., who sued and obtained judgment thereon against the principal and sureties, upon which judgment execution was issued and levied on property of the principal sufficient to pay the debt. A delivery bond was executed by the principal with the present plaintiff, Thomas Brown, and others, as sureties; but the defendant refused to join in the bond, and desired the sheriff to go on and sell the property. The property was not delivered on the day of sale as stipulated in the delivery bond, nor was the debt paid. The bond was accordingly forfeited, and judgment obtained thereon, on motion, against all the obligors, except Lewis Brown, who died some time after the bond was executed. The present plaintiff paid the whole of the judgment, and then filed this bill for contribution. Bill dismissed and the complainant appealed.

J. W. Combs, for the complainant.

A. Wright, for the defendants.

By Court, **GREEN, J.** It is very clear, that the defendant McDonald not having joined in the execution of the delivery bond, could not, after the execution by the other defendants and their securities, have been rendered liable to E. Webb & Co. for the amount of the judgment, to satisfy which, the levy was made on the property, for the delivery of which the bond was taken: *Young and Whitcomb v. Read*, 3 Yerg. 297; *Laird v. Camp and others*, 6 Id. 246. But it is contended, that although the defendant was released from his liability to the

plaintiffs in that action, it does not follow, that he ceased to be liable to contribute to his co-security, should he pay the debt. We think it does, for several reasons. In the first place, by the levy of the execution upon a sufficient amount of the property of the principal to make the sum called for in the execution, it was satisfied, and consequently all the liability of the complainant and defendant thereby became extinct: *Young and Whitcomb v. Read*, 3 Id. 297; *Laird v. Camp and others*, 6 Id. 246. The subsequent liability of the complainant arose upon the execution by him of the delivery bond; and as the defendant did not execute it, nothing can be plainer than that he was released from all obligation, as well to the plaintiff as to his co-security.

There is, however, another view of the subject which is conclusive. Nothing is better settled, than that if the plaintiffs had made a binding contract with the other defendants in the execution, by which to release the levy and give farther day for payment, contrary to the wish and consent of the defendant McDonald, such act would have released him from any further liability. If, then, his co-defendants, among whom was the complainant, availing themselves of a legal power, without his consent and against his wishes, in effect do the same thing, does it not follow, that by the same principle he must be released from any obligation to them? The implied agreement of co-securities, that they will contribute equally of the amount that either of them may be compelled to pay for the principal, is not a stronger obligation than that which they owe to the payee of the note; anything, therefore, which if done by the latter, would release the security, must have the same effect, if done by the former.

In this view of the case, it is unnecessary to consider what is the true construction of the act of 1831, c. 25. It is admitted by the parties of record, that the delivery bond was a valid one, and taken in pursuance of law. It is also admitted in argument, and is unquestionably true, that however this may be, still the bond is good as a common law obligation. In either case, the contract was such an one, as that the levy was released, and further time was given without the consent of the defendant McDonald. He could not have controlled the execution or prevented this course of proceeding, if he had paid the amount to the plaintiffs in the execution; so that without his consent, a liability is attempted to be forced upon him, from which he would have been discharged, but for the act of the

complainant in executing the bond. He ought not, therefore, to be liable to contribute.

Decree affirmed.

CONTRIBUTION, RIGHT OF, BETWEEN CO-SURETIES: See *Cage v. Foster*, 23 Am. Dec. 265, and other decisions in this series cited in the note thereto.

RELEASE OF SURETY, ABANDONMENT OF LEVY ON GOODS OF PRINCIPAL, when does not operate as: See *Bank of Montpelier v. Dixon*, 24 Am. Dec. 640 and note. The decisions in this series on the subject of release of sureties by indulgence to principals generally, are collected in the notes to *Caston v. Dunlap*, 23 Id. 197, and *Bank of Montpelier v. Dixon*, 24 Id. 640.

SCRUGGS v. GASS.

[8 YERGER, 175.]

PAYMENT IN THE BILLS OF AN INSOLVENT BANK, received as cash, neither party having knowledge of the insolvency, is valid, and no action can be afterwards brought on the debt, unless perhaps where the payee presents the bills to the bank, and upon refusal to pay them, gives due notice to the person from whom he received them.

ACTION for the price of bacon sold and delivered. Payment had been made, shortly after the purchase, in the bills of the Macon bank, which had already failed and stopped payment, though neither party had knowledge of that fact. On learning it, Scruggs, the purchaser, offered to return the bills, and demanded payment in money, which being refused, he brought this action. The court below held that he could not recover. Verdict and judgment for the defendant, and the plaintiff appealed.

J. A. McKinney, for the plaintiff in error.

R. J. McKinney, for the defendant in error.

By Court, CATRON, C. J. This action is brought for bacon sold and delivered. Was the demand paid and satisfied by the delivery, and receipt, in payment, of the bank notes? The notes were supposed to be of specie value, when passed, by both parties; in which, however, they were mistaken; the paper being of little or no value. It is insisted for Scruggs, that it stood on the footing of forged and counterfeit bank paper, and the delivery of it to him had no effect as a payment of his original demand, more than if a counterfeit note had been, through mistake, transferred in a supposed discharge of the debt; and that the case falls within that of *Markle v. Hatfield*, 2 Johns. 455 [3 Am. Dec. 446].

The effect of a payment in counterfeit paper, or counterfeit coins, both parties being innocent, is not presented for decision, and will not be discussed. It is not this case, where the paper was what it purported to be upon its face, promissory notes by a corporation, and the mistake consisted in the supposed ability to pay on part of the corporation. We are inquiring whether the payment was void or valid; it must be considered the one or the other; we are of opinion, the mere proof that the bank had failed generally to redeem its paper, and that such paper had, in consequence, greatly or wholly depreciated in value, is an insufficient ground to pronounce void the payment.

The rule laid down by Starkie, in his treatise on evidence, vol. 2, p. 186 (Phila. ed. 1834), is the true doctrine on the subject; that if a party agree to take the notes of a third person, payable to bearer, as money, absolutely, and without condition, and they are what they purport to be, they operate as a satisfaction of the debt, though the maker be insolvent. It would be otherwise, if the notes were not what they purported to be, but forged. The case is stronger when bank notes are paid as cash, unconditionally; and such was the case of *Cambridge v. Allenby*, 6 Barn. & Cress. 373. Where A. paid notes of the Hutersfield bank to B. at York, at three in the afternoon of the tenth, in payment of goods; the bank having stopped payment at eleven o'clock of the forenoon of the same day, but neither party knew of the stoppage or insolvency; and B. neither circulated the notes nor presented them, but afterwards required A. to take them back, and pay him the amount: it was held, the debt was satisfied: Com. L. 201.

To adopt a different rule, would end in much litigation and confusion. If Scruggs could recover from Gass, the latter, of course, could have his remedy against the person from whom he received the paper; and by this means, it would be traced back by suits, to the holder at the period when the bank refused specie payment. And if insolvency of the bank would authorize the recovery on the original demand, no reason is perceived why, by the same rule, partial inability to pay, on the part of the corporation, would not authorize a partial recovery for the amount the bank notes were worth less than specie in the market; a rule which, if adopted, would threaten endless strife and litigation.

This court does not say, but that Scruggs might have avoided the effect of the payment in the bank notes, by having presented them to the bank for payment, and on refusal, notified

Gass of the fact. Generally, a transfer, by delivery, of an individual note, payable to bearer, without indorsement, where made for a pre-existing debt, imposes on the person making the transfer, the same liabilities resting on an indorser, as between the immediate parties; but then, he who receives the paper is bound to the same diligence as an indorser, to make demand, and give notice of a failure to pay on part of the maker: Chit. 142.

That there is any legal distinction between the notes of individuals, and those of corporations for banking purposes, it is difficult to maintain. The supreme court of New York, in *Markle v. Hatfield*, above cited, thought there was none; yet no such question is raised in this cause, and no adjudication called for on the point. The ground on which this recovery is sought, not being demand and notice, but evidence that the notes had lost their value as cash in the market, because of the belief with the community, that the banking association who issued the notes could not, or would not pay them on presentation; and on which evidence, knowledge and fraud aside, we think no recovery can be had, and that the judgment must be affirmed.

Judgment affirmed.

PAYMENT IN NOTES OF INSOLVENT BANK: See, for an extended examination of the authorities on this point, the note to *Ontario Bank v. Lightbody*, 27 Am. Dec. 188. The principal case is referred to as an authority on this point in *Foster v. Swasey*, 2 Wood. & M. 227. In *Ware v. Street*, 2 Head, 612, the court disapprove the dictum in the principal case, to the effect that payment in bank notes stands on the same ground as payment in ordinary promissory notes, so that recourse can be had upon them, or the payment avoided in case of presentation and refusal to pay. On this point the court say: "We think such is not the law; but that a payment without fraud, in bank notes circulating and received as money, can not be avoided by demand, refusal, and notice, or tender to the payor. It would be most unreasonable and inconvenient to hold otherwise."

MITCHELL v. LIPE.

[8 YERGER, 179.]

REQUEST TO LEVY IS NO WAIVER OF NOTICE of the time and place of a sale on execution on the part of a judgment debtor, and a sale without such notice is void.

EXECUTION DEBTOR'S POSSESSION IS NOT ADVERSE TO THE PURCHASER under the execution, but is that of a *quasi* tenant at will until actual disseisin or disclaimer, and such possession does not, therefore, render a subsequent sale by the purchaser void for champerty.

OFFER TO REDEEM THE LAND on the part of the debtor is a recognition of the execution purchaser's title in such a case, which estops him from afterwards disputing it.

SHERIFF'S RETURN OF AN EXECUTION SALE IS NOT EVIDENCE AGAINST THE PURCHASER, or a purchaser from him, of the existence of a deed of trust, to which the sale is in such return stated to be subject. *Contra*, Peck, J., dissenting.

ACTION to recover possession of two tracts of land. The plaintiff's lessors claimed as purchasers from Richard Mitchell, who purchased the two tracts at sales on two executions against Lipe, one of the present defendants, who formerly owned the land. The first execution was levied on one of the tracts at the request of Lipe, who was then residing on said tract, and has ever since continued to reside there. No notice was given to Lipe of the time and place of sale. The other tract was sold to Mitchell on a subsequent execution against Lipe, the sheriff making return as follows: "Sold the within-described tract of land, subject to a deed of trust to Richard Mitchell, etc., on the twenty-fifth of November, 1822, to Richard Mitchell," etc. On July 1, 1825, Mitchell conveyed both tracts to the lessors of the plaintiff, who afterwards brought this action against Lipe and Beeler, defendants. The judge of the court below charged the jury, that, as to the first tract, the request to levy, if proved, was a waiver of notice, so as to render the sale valid. As to the second tract, he charged them that the return was conclusive evidence of the existence of the trust deed, showing that the legal title was in Richard Mitchell, and not in Lipe, so that nothing passed by the deed to the purchaser at the sale. Verdict for the plaintiff's lessors as to the first tract, and for the defendants as to the second. After a motion for a new trial, which was refused, the plaintiff's lessors appealed.

R. J. McKinney, for the plaintiffs in error.

J. A. McKinney, for the defendant in error.

By Court, **GREEN, J.** It is insisted, that the request of Lipe to levy upon the tract of land first sold was a waiver of the notice required to be given by the act of 1799, c. 41, sec. 1. We can not concur with the counsel for the plaintiffs in this view of the case. The important facts of which the act intended the party to be notified, were, the time and place of the sale. The knowledge on the part of the defendant, of the levy as made by his request, could not in the least tend to give him information of the other facts, or amount to a waiver of the right to be notified of them. The notice not having been given, nor a

waiver thereof having been made, the sale of that tract is void, and the sheriff's deed communicated no title to Mitchell, the purchaser: *Troll and McBroom v. Gordon and McGavoch*, 1 Yerg. 469; *Rogers v. Jennings*, 3 Id. 308. As to this tract, therefore, from the facts in this record, the lessors of the plaintiff are not entitled to recover.

As to the last tract that was sold, there is no evidence in the record, that the defendant Lipe was in possession thereof at the time of the levy and sale, or at the date of the deed from Richard Mitchell to the lessors of the plaintiff; so that the questions of champerty, and notice to the tenant, do not arise. The only witness who speaks of the possession by Lipe, expressly confines himself to the tract upon which Lipe then lived, viz., "the upper one of said tracts." The only proof in relation to the possession of the last tract sold, is that introduced by the lessors of the plaintiff, that Beeler and Lipe were in possession when the suit was brought.

But if the defendant Lipe was in possession of this tract at the time of the sale from Richard Mitchell to the lessors of the plaintiff, still the deed would not be affected by the champerty act of 1821, c. 66, sec. 1. To make the deed void for champerty, there must have been an adverse holding by Lipe. This could not be, for his title having been transferred by the sheriff's sale and deed, to Richard Mitchell, his possession afterwards was consistent with Mitchell's title, under which he held as *quasi* tenant at will. In this character he would be deemed to continue the possession, until an actual disseisin or disclaimer on his part. Such is the doctrine of all the books: 1 Johns. Ch. 153;¹ 1 Johns. 453;² C. R. 188; 3 Mass. 128;³ 1 Pet. 570;⁴ 1 Chit. Pr. 257. In addition to this, he offered to redeem the land, which was equivalent to an offer to purchase the title of Mitchell, and which recognized the title of Mitchell, so that he can not now dispute it, or set up that he has held adversely to it: *Tillinghast's Adams' Eject.* 57, note 2, and authorities; *Jackson ex dem. Viely v. Cuerden*, 2 Johns. Cas. 353.

The only remaining question is, whether the statement of the sheriff, in his return on the execution, is to be taken as conclusive of the fact, that at the time of the sale, the legal title to the land was not in Lipe, but in Mitchell, and that, consequently, Mitchell took nothing by the purchase deed. The

1. *Jackson v. Sternbergh*.

2. *Bayard v. Malcolm*.

3. *Commonwealth v. Andrews*. This citation and that immediately preceding are plainly erroneous.

4. *Waring v. Jackson*.

opinion was given in charge, by the circuit court to the jury, and a verdict and judgment were rendered against the lessors of the plaintiff.

We feel the importance of adhering to former adjudications, and the mischiefs which result from a fluctuation of opinion upon any question; yet questions will sometimes occur, when a point may be adjudicated without the benefit of all the authorities which could shed light upon it; and when a reconsideration of it is highly proper. Upon the question now under consideration, we believe the former opinion is erroneous. In the case of *Jackson v. Sternbergh*, 1 Johns. Cas. 185, it is decided, that the sheriff's return is not essential to the title of the purchaser. Lansing, C. J., in delivering the opinion of the court observes: "But the sheriff's return, in my opinion, was not essential to the title of the purchaser. That title was not created by, nor dependent on the return, but was derived from the previous sale made by the sheriff, by virtue of his writ. It was sufficient for the purchaser, that the sheriff had competent authority, and sold, and executed a deed to him." In the case of *Wheaton v. Sexton*, 4 Cond. R. 520; 4 Wheat. 503, Mr. Justice Johnson, in delivering the opinion of the court, observes: "On this point, the court can only express its surprise, that any doubt could be entertained." The purchaser depends upon the judgment, the levy, and the deed. "All other questions are between the parties to the judgment, and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return."

Adopting, as we do, the principles of these cases, we are of the opinion, that the sheriff's return is not necessary to a deraignment of the title of the lessors of the plaintiff, and is no proof of the existence of the deed of trust therein mentioned. If the effect contended for were given to the return of the sheriff, it would enable him, months after a good title had been acquired by purchase and deed, to defeat it altogether, merely by making a false indorsement on the execution. But upon principle, the sale and the sheriff's deed are sufficient evidence of the title; and if the purchaser can show, that the sheriff has authority to sell, it is enough, and he need not look farther. We are of opinion, therefore, that the lessors of the plaintiff, upon the facts in the record, are entitled to recover the second tract of land, and, therefore, order that the judgment be reversed,

and that the cause be remanded to the circuit court of Hawkins county, for another trial to be had therein.

PECK, J., dissenting. I have heard nothing that convinces me of the propriety of changing the opinion delivered by Judge Whyte and myself, at a former term of this court, upon the effect of the return of the sheriff. That the record, of which the execution forms a part, must be produced and looked to in making out the chain of title, has never been questioned in Tennessee, and that the return upon the execution made by the officer, both of levy and sale, when replaced in the office from whence it issued, is thenceforward a record, is equally clear and unquestionable. The return thus of record is an evidence of facts done *in pais*. It is more certain than frail memory, and hence the wisdom of the law in preserving, in this form, the evidence of levy and sale. If it be true that the deed, reciting what has been done, can alone be looked to, and that such recitals must be taken as true, without the aid of the return, then it will follow that our land titles will be suspended upon a frail tenure. A sale may be made, the execution concealed, not lost, and other lands than those levied on or sold, conveyed. Subsequent sheriffs make deeds, long after sales made by a previous sheriff. Years after the transaction has passed, the title will be made to depend upon matters of mere memory, or upon the fabricated stories of executions, levies, and sales, where none existed. The very question may be the description of the land, and the conformity in the deed with the return upon the execution.

The description of the land in the deed, is a recital of what the execution shows. How a recital shall become higher evidence than the thing recited, is a position in law not easily to be seen. A party may, by a recital, estop himself from denying the existence of the matter recited. The sheriff would be estopped by his recital; but the rule does not apply to others. The recitals in the sheriff's deed must be sustained by the production of the thing recited; the return, when produced against the debtor, where land has been sold, and this, when produced, must be taken altogether. Whether the sheriff has returned the truth or a falsehood, is a matter not before me, it is enough that he shows in his return that he sold an equity only, and the plaintiffs having shown that fact to the court and jury, when he produced the execution, is forbid to deny it. A purchaser at sheriff's sale is not bound to pay the money until he has seen the return indorsed upon the execution. It is the

evidence of his right, and he is entitled to have it entered before he pays. Mitchell, then, must have known what title he was getting; he can not garble the return upon the trial, and say that part shall be received as evidence, and part shall not; the whole must be taken.

The return has always been resorted to in this country, in looking to the title, as those conversant with the practice know. It was one of the questions in the case of *Vance v. McNairy*, and then it became important to see if the description of the land was the same in the deed with that of the return. It became a turning point in the cause, was debated with ability by counsel, and gravely considered of by the court: See the case 3 Yerg. 177, 178 [24 Am. Dec. 553], (Judge Green's opinion).

Every state in the union has her own policy in the mode of transferring real estate. It has been the business of the legislature, and of the courts, to guard the transfer, by officers' sales, with caution. If the return need not be looked to, in sales for taxes, where a part only may be bid for, and in all the other cases given in the statutes of the country, but that the recital in the deed alone should do, then will the rights to our freeholds and lands become the most precarious of all rights, depending alone upon the integrity of sheriffs. The authorities referred to in Johnston and Condensed Reports have no application to the point here presented, and if they had application, still the course of decision in this state has been adverse to them.

Judgment reversed.

NOTICE OF SALE ON EXECUTION, necessity and requisites of, and effect of want of: See *Farr v. Sims*, 24 Am. Dec. 396, and cases cited in the note thereto. Notice may be waived by the defendant if there are no lawful liens on the property: *Davis v. Murray*, 12 Id. 661 and note.

CHAMPERTY AND MAINTENANCE.—The note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316, is devoted to an examination of the cases on this subject. As relates to sales of land in the adverse possession of another, the law of champerty is particularly discussed on page 321 of that note. See also, *Jackson v. Johnson*, Id. 433, and *Schwartz v. Kuhn*, 25 Id. 239. A purchaser on execution, may convey without champerty, notwithstanding the debtor's possession: *Snowdon v. McKinney*, 7 B. Mon. 258.

OFFICER'S RETURN OF EXECUTION AS EVIDENCE: See *Palmer v. Clarke*, 21 Am. Dec. 340; *Stevens v. Brown*, 23 Id. 215; *Stinson v. Snow*, 25 Id. 238, and other cases in this series cited in the notes thereto. In *Nichol v. Ridley*, 26 Id. 254, a Tennessee case, it is held that a sheriff's return on execution is admissible as evidence against a purchaser of land thereunder, in an action against him by the sheriff to recover the purchase money. The principal case is cited in *Ritter v. Scannel*, 11 Cal. 248, and *Rogers' Lessee v. Cawood*, 1

Swan, 148, to the point that a sheriff's return of a sale on execution is not essential to the validity of the purchaser's title. So in case of an attachment or writ of replevin that the creditor's rights are not dependent on the return where there has been an actual levy: *Lea v. Maxwell*, 1 Head, 369; *Green v. Lanier*, 5 Heisk. 678.

THAT TO SUPPORT THE TITLE OF A PURCHASER ON EXECUTION, it is necessary that he should show a judgment, execution, levy, sale regularly made, and deed, is a point to which the principal case is cited in *Hoyal v. Bryson*, 6 Heisk. 142. But in *Blood v. Light*, 38 Cal. 655, where the case was relied on as an authority on this subject by counsel, it was said by the court not to be in point because it was based on a statute providing that a sale on execution not made in the manner prescribed by law should be null and void. In that case it is held that the purchaser need only show a sale and the officer's authority to make it, and that the former was proved by exhibiting the sheriff's deed, and the latter by proof of the judgment and execution.

THE PRINCIPAL CASE IS ALSO CITED in *Vance's Heirs v. Johnson*, 10 Humph. 221, to the point that the defendant in execution after a sale, is quasi tenant to the purchaser, but that he may, while in possession, attorn to another or acquire an adverse title in himself. In *Lafferty v. Turley*, 3 Sneed, 171, the case is referred to as an illustration of the principles that will guide the court in overruling previous adjudications.

WILLIAMS v. WALTON.

[8 YERGER, 337.]

BILL OF SALE OF A NEGRO REGISTERED BUT NOT PROVED BY TWO WITNESSES.
passes the title as between the parties.

GIFT FROM A FATHER TO HIS INFANT CHILD, in good faith, is as valid as if made by a stranger.

FATHER'S POSSESSION AS NATURAL GUARDIAN of a chattel given to his infant child by himself or another, continued *bona fide* for the required period, vests a good title in the child under the statute of limitations.

TROVER, brought in 1832, for a slave woman and her children. The facts, so far as material to the points adjudicated by the supreme court, were as follows: The slave in question was part of the estate left by the plaintiff's grandfather; Marmaduke Williams, the plaintiff's father, and Morgan Williams, his uncle, being executors of the estate. In 1809 or 1810, Marmaduke conveyed the said slave to Morgan, who in 1811 conveyed to the plaintiff, then an infant, by a deed of gift proved at the March term of the Smith county court by one witness only, and registered May 10, 1811. Possession was delivered to the father under this deed, and the father, in 1817 or 1818, mortgaged said slave to Smith, who had notice of the deed of gift to the plaintiff, and Smith afterwards sold to Walton, the

defendant, who was a witness to the deed of gift. It is not necessary to state the evidence introduced respecting the *bona fides* of the transactions between Marmaduke and Morgan Williams. The judge's instructions, so far as they concern the points decided, are stated in the opinion. In addition to what is there stated, the judge told the jury in substance, that Marmaduke and Morgan being executors of their father's estate, a gift of a chattel belonging to said estate by either would transfer the title as against both, but not as against subsequent purchasers from either, unless it was by deed proved by two witnesses and duly registered, and that if the transaction was a voluntary conveyance to the child by the father indirectly through Morgan Williams as trustee, it could only be made good against a subsequent purchaser by due proof and registration; that actual notice to the purchaser would not do; and that delivery of possession would not suffice as a substitute for registration unless continued openly and distinctly for such a period as to give title under the statute of limitations. Verdict for the defendant. Motion for a new trial overruled, and judgment on the verdict, from which the plaintiff appealed.

James Campbell and Wm. B. Campbell, for the plaintiff in error.

Rucks, for the defendant in error.

By Court, GREEN, J. The charge of the circuit judge is for the most part unexceptionable; but in several propositions stated by him there is error.

Speaking of the deed from Morgan Williams to the plaintiff, he told the jury that as it was only proved by one witness, it was void. This as a general proposition, as here laid down, is not true. Although, as against creditors of a purchaser from the donor, it would be void unless proven by two witnesses, and registered as the law directs, yet as between the parties it is good without registration: *Hawks Dig.* 372; *Davis v. Mitchell*, 5 Yerg. 282.

In the latter part of the charge the court says: "If a third person had given a negro to the child living with its father, the father's possession as natural guardian, would confer the title on the child; but when the gift is directly from the father to such child, or indirectly by first delivering it to the trustee, and then that trustee within three years redelivering to the father to hold for the child; that is not such an open remaining in possession by the donee, as will do against a purchaser."

The first part of the above quotation is correct. An adverse possession of a slave for three years, will confer on the possessor the title, as was holden in *Kegler v. Miles*, Mart. & Y. 426 [17 Am. Dec. 819]. And the possession of the negro by a guardian for an infant, will vest the title in the infant: *Davis v. Mitchell*, 5 Yerg. 282. It is not perceived how the question of the operation of the statute of limitations is affected by the source from whence the title of an infant to the negro may be derived. A gift from a father to an infant child, is as valid as if it were made by a stranger. The fact in the former case, that the possession was held openly and notoriously for the infant, would be more difficult to establish; but having been established, the same consequences result as though the gift had been made by a third person. This was the case of *Davis v. Mitchell*. Davis' father gave him the negro while he was an infant, and lived with the family of his father, where the negro also lived. On reference to the record it is perceived that the report of that case is defective, in not stating the fact that the negro was given by the father of the plaintiff, and remained in his possession for his son.

If, therefore, the negro was sold by Marmaduke to Morgan Williams, and the possession held by him for himself, and afterwards conveyed by him to the plaintiff, and the possession delivered to his father, and holden for him for more than three years, it would vest in the plaintiff a good title. So, too, if Marmaduke honestly gave the negro to his son, and made use of the conveyances to his brother, and from his brother to his son, and afterwards held the negro in good faith for his son, for three years, the act of limitations would vest in him a good title. But if it was a feigned gift, to deceive and defraud creditors, and a mere pretense that he held for his son, the plaintiff would not have acquired any right thereby.

The judgment will be reversed, and the cause remanded for another trial, when the law as laid down in this opinion, will be delivered to the jury, in addition to that part of the charge which has not been held herein to be erroneous.

Judgment reversed.

INSTRUMENT NOT ATTESTED SO AS TO BE ENTITLED TO RECORD is nevertheless valid between the parties: *Newman v. Chapman*, 14 Am. Dec. 766. The object of the recording acts is to protect subsequent *bona fide* purchasers: *Grimstone v. Carter*, 24 Id. 230.

GIFT OR VOLUNTARY CONVEYANCE BY FATHER TO CHILD, validity of: See *Coleman v. Cocke*, 18 Id. 757; *Howard v. Williams*, 21 Id. 483 and note; *Farr v. Sims*, 24 Id. 395. As to the validity of voluntary conveyances

generally, see *Jenkins v. Clement*, 14 Id. 703, where the subject is discussed at length. See also *Egleberger v. Kibler*, 26 Id. 192, and the note thereto collecting the decisions in this series on that subject; *Whittlesey v. McMaken*, Id. 382, and *Wood v. Jackson*, 22 Id. 603.

BILL OF SALE OF A SLAVE AND REGISTRATION thereof under the act of 1784, were unnecessary to constitute a valid transfer accompanied by a change of possession as between the parties: *Davis v. Mitchell*, 5 Yerg. 281; *Douglass v. Morford*, 8 Id. 373. So held in *Farnsworth v. Lemons*, 11 Humph. 145, citing the principal case. The act of 1784 did not apply to judicial sales, and a registered bill of sale was therefore unnecessary to the validity of such a sale: *Floyd v. Goodwin*, *post*.

POSSESSION OF A GUARDIAN BY NATURE held adversely for an infant, and other acts which are for the infant's benefit, are available, but not those which are of a contrary tendency: *Barbee v. Williams*, 4 Heisk. 525, citing the principal case.

LANE v. MANNING.

[8 YERGER, 435.]

NOTE NOT VOID AT ELECTION OF MAKER, WHEN.—Where a vendor of land, for which a note is given as part consideration, executes a bond acknowledging, among other things, that the contract is to be void if the note is not punctually paid, the "contract" referred to is the contract of sale and not the note, and the maker of the note or his surety can not set up as a defense to an action, thereon that it has become void by non-payment at the day, the election to consider it void resting with the payee, and being determined by bringing the action.

DEBT on a sealed note executed by one Davis, with Lane, the defendant, as surety. Among other pleas, the defendant Lane pleaded in substance that the note was given as part consideration for a tract of land sold by the plaintiff to Davis, the principal in the note; that at the time of the sale the plaintiff executed his penal bond, whereby, among other things, he acknowledged the contract null and void, etc., if the note was not punctually paid when due; and that the note was not punctually paid when it became due, and had thereby become null and void. The plea was adjudged insufficient; and after verdict and judgment for the plaintiff, the defendant brought this appeal in the nature of a writ of error.

Anderson and Lane, for the plaintiff in error.

Samuel Turney, for the defendant in error.

By Court, PECK, J. The matter of the second plea, pleaded by the defendant, does not present a bar to the recovery of the plaintiff below. The contract to be void on the non-payment

of the money, was not the note which was the foundation of this action, but the contract for the sale of the lot.

It does not lie with the payer of the note to say, that his non-payment of the money on the day has made the note void. The election, to say so, rested with Manning, not with the maker of the note. By this suit Manning has elected to have his money; and he thereby affirms his contract and sale of the lot. The money being paid, though after the day by the coercion of law, at the instance of Manning, he may be coerced to convey: a court of equity will compel him, should he refuse.

Judgment affirmed.

CONDITION IN A TITLE BOND THAT THE SALE SHALL BE VOID if the purchase money is not paid when due is for the vendor's benefit, and he may take advantage of it or waive it, at his election: *Caruthers v. McBurney*, 3 Sneed, 590, 593. So where the condition is, that in case of default of payment the agreement is to be considered a contract of rental at will at a fixed rent: *Jones v. Kirkpatrick*, 2 Tenn. Ch. 693, 697, both citing the principal case.

DIBRELL v. MILLER.

[8 YERGER, 476.]

ONE CAN NOT AVER CONTRARY TO A BOND or record declared on. Therefore, a declaration on an appeal bond, averring that by mistake the name of a wrong person was inserted in said bond, and in the decree subsequently entered in the appealed suit, as one of the appellees in said suit, is bad on demurrer.

ON A PLEA OF NUL TIEL RECORD, A VARIANCE between the decree relied on and that offered in evidence, as to the name of one of the parties in whose favor the decree was entered, is fatal, and can not be helped by an averment that the name was inserted by mistake.

DEMURRER GOES BACK TO THE FIRST FAULT in pleading.

DEBT on an appeal bond. The declaration set out the recovery of a certain decree in the chancery court of the third judicial district by Caleb Job, and other parties named, against certain defendants; and a revival of said suit by bill of revivor on account of the death of the said Caleb Job, whereby his administrator, Ephraim Perkins, was made a party plaintiff. It was further averred that an appeal having been prayed from said decree, the present defendant, Miller, as surety for the defendants in said decree, executed with them the appeal bond now in suit, the terms of which were set out in the declaration; but the plaintiffs averred that in drawing the condition of the bond the name of Caleb Job was by mistake inserted instead of that

of his administrator, Ephraim Perkins. It was further alleged that on the appeal in the supreme court, a decree was entered against the defendants for the same sum as in the court below, and for costs; but the plaintiffs averred that by mistake in entering said decree the name of Caleb Job, now deceased, was inserted instead of the name of Ephraim Perkins, his administrator. The said decree was alleged to be still in full force and unpaid, and it was also averred that the amount of the appeal bond had not been paid. The defendant Miller pleaded *nul tiel record*, and a number of other pleas. Issue was joined on the plea of *nul tiel record*, and one other plea; to one of the pleas there was a reply, and to two others the plaintiffs demurred, and the demurrer was sustained. On the trial of the issues the jury found for the plaintiffs, and a motion for a new trial was overruled. On the issue joined on the plea of *nul tiel record* the court held that there was a failure of record to sustain the issue. Judgment, that the defendants go hence without day, which the plaintiffs brought this writ of error to reverse, on exceptions to various rulings of the court.

S. Turney and A. B. Lane, for the plaintiffs in error.

James Campbell and W. E. Anderson, for the defendant in error.

By Court, PECK, J. The first question to be considered is, whether the plaintiffs are entitled to the benefit of their several averments in the declaration, as brought forward by the plaintiffs in this case; the averments must be taken as particular, in contradistinction to general. The office of these special averments is to bring to the view of the court, that which otherwise would not even by implication appear; and while the averment is necessary to make out the right of him who would use it, it must be consistent with the other statements which the plaintiffs set up: Dyer, 146.

The averment being the allegation of the party, can only be used to aid in letting in such matters of fact, proper to be proved, as could not be shown without it. One can not aver against the existence of a recited statute, nor against the proceedings of a court of record, nor to that which is contrary to the bond declared on. To know what may be averred, it is necessary to look to the evidence the averment proposes to let in, and see if it be admissible. The averment may, it is true, cure an ambiguity, arising upon the face of a deed; but if the deed upon its face be plain, to aver against or inconsistent with

it, would be to create an ambiguity. Therefore, the law disallows it.

These rules being premised, it is proper to recur to the averment objected to in the declaration. The first is, "that in drawing the condition to the obligation, and in reciting therein the names of the complainants, the name of Caleb Job, one of the obligors, was inserted by mistake, and that the name of Ephraim Perkins should have been inserted instead thereof, said Job being dead."

The other averment is this, "that in entering the record of the decree last mentioned upon the minutes of the supreme court, the name of Caleb Job was put down and recorded, when in fact the name of Ephraim Perkins should have been inserted in the place of said Job."

What are the effects of these averments? The object or effect is to change the import of the obligation, and to direct inquiry to matters aside from those directly contained in it. Then the demurrer filed by the plaintiffs would reach their own declaration. It is certainly a fair inference, that the obligors understood for what they were bound; the language of the obligation, and all its recitals, are their own. When drawn, and so tendered, it was the folly of the obligors to receive it. I am aware it is common to say, that taking such bonds are the acts of the court; but it can not escape observation that the parties are present when these bonds are taken, and therefore, subject to objection and correction before executed and received. So that there can be no pretense for latitude of construction to reach supposed merits, or cure alleged hardships; they therefore stand, when put in action, as other obligations. The argument, that the appeal, by reason of the bond (such as it was) taken to the supervising court, and that the appellants thereby have had the benefit thereof, and complainants delayed, can not change the law. It is no argument for admitting a principle, which, if carried out, will have the effect, in the language of the books, of making bonds hollow, by means of proofs at war with the tenor and meaning deducible from the face of the instrument, under averments, which make other parties, and create other liabilities, than those within the contemplation of the party executing the same.

As the evidence is inadmissible, the averment was improper. So far, we have considered the case upon the question of evidence, aside from that admissible upon the issue joined on the plea of *nul tiel record*. Can the evidence in support of this

issue be received? It is confessed in the declaration that the bond recites parties to the decree different from those presented in the record; and that to make them consistent, the name of Perkins should have been put in the place of Job, who was dead. The record is relied upon by the plaintiff to make out his case; his right to recover, and the measure of that recovery, depend upon it; hence he has to own its existence and continuance in force. The authorities are abundant to show that there is a failure of record. In debt, on a judgment, a variance as to the name of any party, his abode, or addition, will be fatal on *nul tiel record*: 1 Roll. 654. So in debt on a judgment against Hamilton Fanning, Esq., and on *nul tiel record*, the judgment produced was against the Right Honorable Hamilton Fenning, Earl of Wigton, having the privilege of peerage, the variance was fatal: 7 T. R. 447.¹ So, too, the variance between Edmond Darby and Edward Darby held fatal, although he was the person against whom a commission of bankruptcy had issued, 7 Taunt. 399, and not the party to the suit. So if a recognizance be, to appear and answer for beating one so that he died, and the declaration be for beating one, merely, held fatal: Whart. Dig. 464, an American case. So a declaration on a judgment against A. S. and D. G., was held not to be supported on *nul tiel record*, by a judgment against A. S. and D. G. jun.

Thus we might add cases almost without number in support of the rule. A stronger case to illustrate it than the one before us can not be produced. Suppose the fact to be, that on the day of the execution of the bond, the decree had been entered in favor of Job, the deceased person, that it was done with a view to the appeal, and that the appeal was taken for that cause, the fact of the death lying within the knowledge of the appellants, when afterwards the defect was cured by making Perkins, his representative, a party, and a new decree followed. Who can not but see that the bond became nugatory by the act of the complainants? By their own act they had placed themselves wholly beyond it; the relation of the parties and their rights being thus changed by the complainants, the plea urged by the obligor in excuse would be irresistible. After the making of the bond, the obligors could not control the obligees from the changes they may have thought proper to put upon the record; and as touching this amendment, they were powerless, they could be saved from liability only by the salutary rules of law, which reject the record for the variance. It is not

1. *Blackmore v. Fleming*, note.

intended, however, in the expression of these reasons, to find the delivery of the bond on a day different from that averred; this, in our view of the case, is unnecessary, for the whole case turns upon the other points of variance; which having been rightfully found by the circuit court, the judgment is affirmed. Judgment affirmed.

DEMURRER TO PLEA GOES BACK TO ERROR IN DECLARATION: See *Birney v. Hann*, 13 Am. Dec. 167.

FLOYD v. GOODWIN.

[8 YERGER, 484.]

CHAMPERTY, CONTRACT AFTER JUDGMENT NOT VOID FOR.—A contract between an attorney and client that the former is to have half the amount of a judgment for collecting it, is not within the law against champerty if made after final judgment.

FRAUD A QUESTION FOR THE JURY.—It is for the jury to determine whether a judgment and execution sale, in a particular case, constituted a mere contrivance to delay and defraud creditors, and such fraud is not to be presumed, but must be proved, though the proof may be circumstantial.

CONFESSION OF JUDGMENT NOT NECESSARILY FRAUDULENT, WHEN.—Where a number of notes are made by one person to another, judgments confessed thereon and executions issued on the same day, these are badges of fraud, as against other creditors; but the transaction is not fraudulent, if done fairly and in good faith to secure an honest debt, though also designed to give a preference.

EXECUTION SALE PARTLY COLORABLE IS VOID.—Where a sale is made on a number of executions, some of which have been previously paid, there being no relation of principal and surety between the judgment debtors, as to those so paid, or even when such relation exists, if the paid executions are made use of to deter competition or to swell the consideration so as to delay or defraud other creditors, such sale is wholly void; for a sale based partly on a fair, and partly on a colorable or fraudulent consideration, is within the statute of frauds.

LEAVING THE EXECUTION DEBTOR IN POSSESSION does not render the sale fraudulent as against a *bona fide* purchaser, who is a stranger to the record, but where the plaintiff in the execution is the purchaser and leaves the debtor in possession, he must show that there was a fair and honest judgment, and that it was not a contrivance to hinder or defraud creditors.

PURCHASER ON EXECUTION WHO HAS NOT PAID the purchase money to the plaintiff in execution, or become bound to do so at all events, is not in a position to contest the validity of a previous execution sale of the same property.

ON AN EXECUTION SALE OF SLAVES, A BILL OF SALE REGISTERED as required by the act of 1784, is unnecessary, judicial sales not being within the act.

DETINUE for certain slaves. Both parties claimed under sales on executions against one McGowan. The plaintiffs, who were step-sons of McGowan, purchased at a sale made May 21, 1831, on six executions, issued on May 11, on judgments confessed in their favor on that day by McGowan, on six notes executed on the day before, and payable one day after date. They also produced two other executions against McGowan and in favor of Cowan, the justice before whom plaintiffs' judgments were confessed, and an execution in favor of another party, which were all levied on one of the negroes now in controversy, in March and April, 1831, but which the defendant claimed were paid before the sale to the plaintiffs. It appeared that no notice of sale was posted at the muster ground, as required by law, and that the notices posted in other places were torn down by the plaintiffs, and that only five persons were present at the sale. The negroes were not present at the time of the levy, but one of the plaintiffs promised that they should be produced at the sale. They were present at the sale, and were delivered to the plaintiffs as purchasers, but were returned on the same day to the possession of McGowan, where they were when the defendant purchased. A bill of sale was executed to the plaintiffs by the constable, which was not registered till September 18, 1832. There was contradictory evidence as to whether McGowan was in fact indebted to the plaintiffs in the full amount stated in the judgments confessed by him, the defendant insisting that he was not so indebted, and that the whole transaction was a contrivance to hinder, delay, and defraud creditors.

The defendant claimed as purchaser at a sale made December 10, 1831, on an execution issued upon a judgment recovered August term, 1831, against McGowan by one Willis, in an action of covenant, in which the writ was issued May 10, 1831. The purchasers were the defendant Goodwin, and H. L. Turney. A bill of sale was executed by the deputy sheriff to the defendant Goodwin. It appeared that Goodwin and Turney had been the attorneys of Willis, who was indebted to them on account; that Turney was his attorney in the action against McGowan; that after the judgment was rendered, and one execution returned "no property found," an agreement was made between Willis and his said attorney to the effect that if the latter could recover the amount of said judgment, he should have half of it. It further appeared that Goodwin and Turney had not paid the said Willis any part of the purchase money

for said negroes; that there had been no settlement between them, but that he expected to be paid, and Goodwin had said he would pay him.

The judge of the court below instructed the jury, in substance: 1. That if the alleged agreement between Willis and his attorney, that the latter should have half the amount of the judgment against McGowan for collecting it, was made after the judgment was rendered, it was not within the statute against champerty. 2. That the question as to whether or not the sale under which the plaintiffs claimed was fraudulent and void as against creditors, was for the determination of the jury, under the instructions of the court as to the rules of law applicable to the case; that fraud was not to be presumed, but must be proved, though direct proof was not necessary, circumstantial evidence being sufficient; that the facts detailed above as to the confession of judgments and the circumstances attending the sale to the plaintiff, if proved to the satisfaction of the jury, were badges of fraud; but that if the notes were made for an honest debt, the fact that the judgments were confessed and executions issued on the same day did not render the transaction fraudulent, as McGowan had a right to prefer the plaintiffs to his other creditors, if they were lawfully his creditors, and all was done in good faith to secure an honest debt, the circumstances attending the sale simply throwing upon them the necessity of showing a full and fair consideration for the judgments confessed. 3. That if the consideration of the sale to the plaintiffs was in whole or in part colorable or fictitious, the transaction being a mere contrivance to hinder, delay, and defraud creditors, such sale was void; and therefore, that if the jury should find that the Cowan executions had been, in fact, paid before the sale of the negroes, and were made use of merely to deter competition, or swell the consideration fictitiously, for the purpose of delaying or defrauding creditors, the plaintiffs' purchase was a nullity. 4. That the leaving of the property in the possession of the judgment debtor, or a member of his family, after an execution sale, furnished no ground for the slightest imputation of fraud as against a *bona fide* purchaser, who was a stranger to the record and proceedings; but that it was otherwise where the plaintiffs in execution were the purchasers, and it was incumbent on them in such a case to show that the judgment confessed was an honest and fair one. 5. That if the defendant had not paid the purchase money on the sale to him, or any part of it, to Willis,

and was not to do so unless he should succeed in this suit, he was not in a position to contest the fairness of the plaintiffs' title; but if Willis chose to trust the defendant to pay at some future day, when payment was to be made *bona fide*, and not to be dependent on success in this suit, the plaintiffs could not complain. 6. As to the necessity of a bill of sale and registration thereof, the language of the charge is quoted in the opinion. Verdict for the defendant; motion for a new trial overruled, and judgment on the verdict, from which the plaintiffs took an appeal in the nature of a writ of error.

Taul, for the plaintiffs in error.

Wm. E. Anderson and J. Campbell, for the defendant in error.

By Court, CATRON, C. J. 1. The instruction given to the jury, that the title of the defendant was not void, by force of the statutes to suppress champerty and maintenance, is believed to be correct.

2. The charge on the second point was correct. It left the facts fairly to the jury.

3. The charge on the third point, is perhaps slightly objectionable in reference to Stewart Cowan's executions. Cowan might have been paid the amount due him, and the executions remain valid. A security may pay the creditor his money, and still by contract with the creditor, cause to be enforced the execution against the principal debtor, although the execution be jointly against the debtor and security. Such is the spirit of our legislation on the subject of enforcing executions against debtor and security; and so this court held in *Gunn and Boyd v. Tunnehill*, 2 Yerg. 544. Aside from these facts, the relation of principal and surety not existing, the charge was correct; if the relation did exist, and the debt was paid with the fraudulent intent set forth by the charge, the sale was colorable and void as to Cowan's executions; and being colorable in part, is void, although made by virtue of other valid executions; because a purchase based on partly a fair, and partly a colorable and fraudulent consideration, is within the statute of frauds, for the reasons given in the cases of *Darwin v. Handley*, 3 Id. 502, and *Somerville v. Horton*, 4 Id. 541 [26 Am. Dec. 242].

4. On the fourth point the charge was remarkably accurate. A third person, purchasing at execution sale, takes a title disconnected from the debtor and creditor. The transaction is open and notorious, and the evidence of title is the record of recovery in favor of a third person. With the possession of

property thus acquired, the purchaser may deal as if the creditor had never been the owner, or in possession thereof: 2 Stark. 619. If, however, the judgment is a mere contrivance to hinder and delay creditors, and the plaintiff purchases with this intent, the purchase is void.

5. The charge on the fifth point was not objected to by either party, and is not objectionable had it been.

6. On this point arises the only controversy worthy the serious attention of the court, as a revising tribunal, and the only one on which much attention is bestowed. The circuit court was asked to charge, that by the acts of 1784, c. 10, sec. 7, and 1789, a bill of sale from the officer making the execution sale, was necessary to vest a title in the purchaser as against the creditors of the execution debtor; and that such bill of sale must be registered within twelve months from the date of the purchase. That there not having been made any bill of sale for the slaves by the officer who sold them to the Floyds, within twelve months after the sale, they had no title that could be enforced as against creditors in a court of law. A bill of sale had been made to the Floyds by the officers, but more than a year after the date of the sale, and after they brought suit for the negroes.

On the effect of this bill of sale, and in response to the request to charge what its effect was, the court said: "I am of opinion, the words, all sales of slaves, include sales under legal process, as well as private sales; and, therefore, that the bill of sale to plaintiffs from the constable, ought to have been made and registered within twelve months, to make it available; and personal notice is of no avail, when the law requires notice from the register's office, and the records thereof."

This part of the charge took the cause in effect from the jury, and most properly, if the law was correctly charged; for it would have been idle to try the complicated and doubtful matter of law. Are judicial sales within the purview of the act of 1784? The levy of the execution divests the title out of the debtor, and discharges the debt, as this court has holden: *Young v. Read* 3 Yerg. 297; 6 Id. 246. The property being in custody of the law, remains so until the sale is made, when a title immediately vests by the sale. This is evidenced by the levy and return of the sale, which return becomes matter of record, and furnishes a record title, notoriously and openly made, and is the farthest from a secret sale that can well be imagined; and to private gifts and sales, the act has at all times

in this state been holden to apply, so far as my knowledge extends. The acts of 1784, and 1789, c. 59, sec. 2, were intended to apply only as between vendor and purchaser, to give notoriety to the transfer of slave property. There was no necessity for such a provision in cases of judicial sales: *Vide* 5 Id. 127.¹

We are told by the act of 1784, that all sales of slaves shall be in writing, attested by at least one credible witness, or otherwise shall not be valid; and shall be proven and recorded within nine months; which, by the act of 1789, is extended to twelve months. If it be true, that a judicial sale of a slave shall be in writing, this writing is furnished by the levy and return: shall it be attested by a witness, proved, and registered? This can not have been the intention of the legislature, if it was meant to extend the acts to judicial sales; for after the officer makes the sale, he has no farther title; if he has, the property must rest in him and the custody of the law, until some further step is taken with it. Here another creditor has seized upon the property and sold it, and the defendant's claim under such sale.

It would be difficult to hold the second purchase good; or take a title against the officer who first levied, and attempted to sell to the Floyds. The officer held the possession lawfully, and as a bailee, could recover it from another. The lawful possession was transferred to the Floyds, even admitting the sale was void. They hold for the officer, with the levy fixed on the slaves; their possession is *prima facie* lawful, and they are authorized to recover on their possession, unless the judgment and execution under which they claim are fraudulent, and for this reason void, which destroys the force of the levy. Aside from the sale, the Floyds had the same right to recover the slaves the officer would have had from whom they obtained the possession.

But this consideration is aside from the true question. The sale vested the title to the slaves in the purchaser, and if the officer had refused to deliver the property on payment to him of the money bid, I think there is no doubt the purchaser could have recovered the slaves in detinue, without having obtained a bill of sale from the officer. He took title aside from the register acts, and transferred it without reference to them, nor does any one register act, requiring titles to goods to be registered, contemplate a record title, made up of judgment, execu-

1. *Thomas v. Blackmore.*

tion, levy, and sale. In this part of the charge the circuit court erred.

On the last objection, the deputy sheriff could not make a bill of sale; of course nothing further need be said, as my opinion is, the defendant took title without any, if the title of the *Floyds* was void.

Judgment reversed.

CHAMPERTY, WHAT IS.—For an extended discussion of this subject, see the note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316. See also, *Rust v. Larue*, 14 Id. 172; *Brown v. Beauchamp*, 17 Id. 81; *Varick v. Jackson*, 19 Id. 571; *Best v. Strong*, 20 Id. 607; *Tuttle v. Jackson*, 21 Id. 306; *Jackson v. Andrews*, 22 Id. 574; *Mitchell v. Lipe*, ante, 116, and note.

FRAUD, EXISTENCE OF, IS A QUESTION OF FACT for the jury under all the circumstances of the case: *Hamilton v. Greenwood*, 1 Am. Dec. 607. But if there is no dispute as to the facts, it is a question of law for the court: *Jennings v. Carter*, 20 Id. 635; *Diver v. McLaughlin*, Id. 655.

FRAUD IS NEVER PRESUMED, but must be proved: *Baudin v. Roliff*, 14 Am. Dec. 181; *Davis v. Culvert*, 25 Id. 282. Positive and direct proof is unnecessary, however, if the circumstances of the case when combined are sufficient to satisfy the jury of the fraud: *Davis v. Culvert*, *supra*. To the same effect is the principal case, and it is cited as an authority for that position in *Harri v. Smith*, 2 Coldw. 308.

JUDGMENT GIVEN TO DELAY CREDITORS is void as against them: *Mackie v. Cairns*, 15 Am. Dec. 477.

FRAUDULENT PREVENTION OF COMPETITION AT EXECUTION SALES, effect of: See *Stockton v. Owings*, 12 Am. Dec. 302; *Mills v. Rogers*, 13 Id. 263; *Smith v. Greenlee*, 18 Id. 564 and note; *Martin v. Blight's Heirs*, 20 Id. 226; *Farr v. Sims*, 24 Id. 396 and note.

LEAVING EXECUTION DEBTOR IN POSSESSION after sale, effect of: See *Myers v. Harvey*, 23 Am. Dec. 60, and *Farr v. Sims*, 24 Id. 396, and cases cited in the notes thereto.

REGISTRATION OF BILL OF SALE OF NEGRO under the act of 1784, necessity of: See *Williams v. Walton*, ante, 122, and cases cited in the note thereto. That a registered bill of sale was not necessary, under that act, to pass the title to a purchaser at a judicial sale, is a position for which *Floyd v. Goodwin* is recognized and approved as authority in *Shaw v. Smith*, 9 Yerg. 101; *Goodwin v. Floyd*, 10 Id. 520; *Banks v. Thomas*, Meigs, 32. The case of *Goodwin v. Floyd*, 10 Yerg. 520, was a second decision of the principal case. It was there held, as in the decision above reported, that the plaintiffs, the *Floyds*, need not show a registered bill of sale. It appearing further that there was some evidence that Goodwin, the defendant, purchased under a contract with the plaintiff in the execution under which he purchased, that he was not to pay the price unless he was able to hold the property by law, it was decided that such a contract would not vitiate the sale, and that the statute against champerty and maintenance had no application to the case.

AS TO THE RIGHT OF INDORSERS TO TAKE AN ASSIGNMENT of a judgment against themselves and the principal debtor, and to enforce it against the principal, for their indemnity, is a point to which the dictum in *Floyd v. Goodwin* is cited as authority in *Maxwell v. Owen*, 7 Coldw. 633.

GILLESPIE ET AL. v. STATE.

[3 YERGER, 507.]

JUROR ONCE SWORN CAN NOT BE CHALLENGED for any pre-existing cause.

GRAND JUROR SITTING ON TRIAL JURY.—The objection that one of the jurors in a criminal case was a member of the grand jury who found the indictment, if not taken before the juror is sworn, can not be made a ground for a new trial, though the prisoner swears that the fact was unknown to him until the jury retired.

INDICTMENT for riot. After a verdict of guilty, the defendants moved for a new trial on the ground that two of the jurors were members of the grand jury who found the indictment upon affidavits stating that they, the defendants, did not know the fact until after the jury were charged. Motion overruled, and the defendants appealed.

H. L. Turney, for the plaintiffs in error.

John D. McCormack, attorney-general, for the state.

By Court, CATRON, C. J. Was the new trial properly refused? Nothing has been better settled for centuries in England, than that after a juror is once sworn, he can not be challenged for any pre-existing cause: 1 Inst. 158; 3 Vin. Abr. 11, 764; Yelv. 24; 1 Yerg. 219. No higher authority of what the criminal law and its practice is, can be referred to than Hawkins' Pleas of the Crown, who lays down the rule to be, "that no juror can be challenged, either by the king or the prisoner, without consent, after he has been sworn, unless it be for some cause which happened since he was sworn:" 2 Hawk. P. C. 43. Nor is want of knowledge an exception to the general rule: *The King v. Wharton*, Yelv. 24; *McClure v. State*, 1 Yerg. 219; furthermore, by the common law, an indictor was a competent traverse juror, to alter which it was enacted by the 25 Elizabeth, c. 3, "that no indictor shall be put on inquests upon deliverance of the indictors of felony or trespass, if he be challenged for the same cause by him who is indicted:" 3 Bac. Abr. 757, Jury, 5. If the juror be not challenged, he is competent to try the issue; nor can it be permitted to let the defendant annul the verdict against him, on his affidavit of want of knowledge: affidavits always to be had in cases of convicted felons, and which are not subject to be disproved. But in this case the record evidence in the cause shows who the grand jurors that found the indictment were, and the defendants can not be heard to say they neglected to inform themselves personally or by counsel of the fact: the law fixes them with knowledge.

To hold otherwise than as above would sap the foundations of the trial by jury: a party in a civil or criminal cause (the rule being the same in each) could elect one or more jurors whom he had the right to challenge, because, for instance, the juror had formed and expressed an opinion against him, and make an experiment: on the failure of which, make an affidavit, showing the fact of incompetency, and stating the want of knowledge until it was too late to challenge the juror, when a new trial will be granted of course. Such a contrivance could be practiced in most criminal trials of the higher grades, where the triers generally of the county having jurisdiction, had formed and expressed opinions on the merits of the cause, and when so many jurors are presented who are not householders, or open to challenge for other reasons. The judgment will be affirmed.

Judgment affirmed.

DISQUALIFICATION OF JUROR AS GROUND FOR NEW TRIAL.—This subject is discussed in the note to *Rollins v. Ames*, 9 Am. Dec. 81. The fact that an alien has been permitted to sit on the jury in a criminal case is no ground for a new trial, where no objection was made by challenge: *State v. Quarrel*, 1 Id. 637.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

STOW v. STEVENS.

[7 VERMONT, 27.]

AN AGREEMENT TO GIVE A GOOD AND VALID DEED calls for a deed that will convey the title to the land.

WHERE A VENDOR WHO AGREES TO CONVEY, upon the payment of money and the execution of notes, at a certain time, before that time conveys to another, the vendee in an action for the breach must aver readiness to perform, although a tender of performance is not necessary.

IN SUCH A CASE, IF PART OF THE MONEY HAS BEEN PAID, the vendee may regard the contract as rescinded, and sue in *assumpsit* for the sum advanced.

DEBT on a bond under seal. The declaration included the common count for money had and received. The case appears from the opinion.

C. Adams, for the defendant.

Hyde and Peck, contra.

By Court, **MATTOCKS, J.** This was an action of debt, demanding one thousand two hundred dollars in several counts, declaring on a penal bond, dated August 11, 1822, for two hundred dollars; also in general counts in debt, for money lent and goods sold and delivered. To these latter counts defendant pleaded *nil debet*, and the plaintiff joined. To the former the defendant prayed oyer of the condition of the bond, which was, "that on the payment of the sum of one hundred dollars, in current money, by the said Loren to the said Stevens, and also on the execution of two promissory notes, by the said Loren to the said Stevens, for one hundred and five dollars

each, one payable in one year and the other in two years from the date, with interest, on the first day of April next (1833), if the said Stevens shall execute and deliver to the said Loren, on the said first day of April next, after the payment of said sum of one hundred dollars, and the execution and delivery of said promissory notes by the said Loren to the said Stevens, a good and valid deed, with the usual covenants of seisin and warranty," of certain lands, then the bond to be void, otherwise in force. The defendant then pleaded in bar, that the plaintiff did not, on the first day of April, 1833, pay said one hundred dollars, nor execute said two promissory notes of one hundred and five dollars each, although thereto requested by defendant; and that he the defendant was ready and willing to have executed a deed according to the condition of the bond, if the plaintiff had performed on his part. To which plea the plaintiff replied, protesting that the defendant did not request the plaintiff to pay the money and execute the notes, and that the defendant was not ready to execute and deliver a good and valid deed; that at the time of executing the bond declared upon, the defendant was well seised of the lands in question, and had lawful authority to sell and convey the same; yet afterwards, and before the first of April, 1833, to wit, on the thirty-first of January, 1833, the defendant sold and conveyed the same lands to one Alfred Hawkins; and the defendant has never since had any right or title to said land, and whereby he had disabled himself from performing the condition of said bond; "for which reason the said Stow did not, on the said first day of April, 1833, pay to the said Stevens the sum of one hundred dollars, and execute and deliver to the said Stevens the said two promissory notes, but neglected so to do, as he lawfully might, for the cause aforesaid;" and averring, that the defendant has never executed to the plaintiff any deed of said lands, and so has broken his covenant. To which replication the defendant demurred, and the county court adjudged that the replication was insufficient. On the trial of the issue in fact, under the plea of *nil debet*, the plaintiff offered to show in evidence, that at the time the bond in the declaration mentioned was executed, the plaintiff paid to the defendant, in personal property and money, about one hundred and twenty-five dollars, as a part of the price of the lands; and that the remainder of the purchase money was to be paid at the time and in the manner mentioned in the condition of said bond. The plaintiff offered also to show all the facts set forth in his replication; and this evidence being objected to by

the defendant, was rejected by the court, and judgment passed for the defendant; and whether these decisions were correct, are the questions submitted.

As to the sufficiency of the replication, the condition of the bond no doubt requires the money to be paid and the notes given before the plaintiff is entitled to the deed; that is, the defendant is not bound to part with his land until he has his money and his security; but whether the plaintiff was bound actually to hand over without a deed being given simultaneously, is not now in question, as this part of the case must be decided upon the validity of the plaintiff's excuse for not performing on his part; for unless this is valid, there is evidently no breach of the condition alleged. The defendant's counsel contends, that the expression, "a good and valid deed, with the usual covenants," relates only to the form of the deed and the manner of its execution, and not to the title of the land; and relies on 1 Saund. 320,¹ and *Aiken v. Sanford*, 5 Mass. 494. There is nothing in Saunders, nor in the notes, to this point. In *Aiken v. Sanford*, which was debt on a penal bond, conditional to sell and convey to plaintiff certain lands in a reasonable time, after the payment of a certain sum of money, on the defendant's showing that he had tendered a deed, it was objected that when the deed was offered the land was subject to a mortgage, although it was paid off before action was brought; and the court say, "that the validity of this objection depends upon the condition which required a conveyance of the land by a good and sufficient deed of warranty. The import of these words is confined to the form of the deed and its execution, and not to the title. If the deed was of a proper form, and regularly executed, and the grantor was seised, so that the land was conveyed by it, the condition in this case was performed." But they also observed, that they did not mean to determine, that in no case these words should be considered as applying to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction, that a good and sufficient title should be conveyed; otherwise, the purchaser might part with his money, not merely for the land, but for a lawsuit also. This *per curiam* opinion seems upon the whole to make for the plaintiff; for here the plaintiff, when he contracted to convey, was seised; but by his own act he had become disseised before the day of performance, and his deed would not have conveyed the land; and the deed, besides, was to have been given the

1. *Portage v. Cole*.

same day, although after the payment of the money, which is not giving credit or time for the deed after the payment.

Among the cases cited by the plaintiff's counsel is *Teaf's case*, in Cro. Eliz. 7. It consists of twelve lines of black letter, and is worth transcribing, not only because it is pithy and *à propos*, but to remind the profession that to say all that is needful in few words is among the lost arts: "Debt upon an obligation: the condition of the obligation was, that if the obligor deliver to the plaintiff an obligation, in which he was obliged to the defendant before such a day, then, etc. The defendant sueth the plaintiff upon that obligation and recovereth, and afterward, and before the day, he delivereth the obligation to him. The question was, if this were a performance of the condition. Wray and the other justices held that it was not. Although the words were performed, yet the intent was not performed; for the intent was, he should have the obligation for his discharge, which is not by the delivery of it at the day, for it is transferred *in rem judicatum*; and notwithstanding the delivery of the bond, yet he may have benefit of the judgment." This was a point-blank decision before circumlocution became professional, that performance to the letter was not performance to the sense. And may the countermarch of mind bring posterity back to such unsophisticated decisions and to such clearness in reporting; and then to gain a cause, it will not be necessary to "carry three camel loads of books before the prætor."

Clute v. Robison, 2 Johns. 618, and *Judson v. Wass*, 11 Id. 525 [6 Am. Dec. 392], show that a deed with covenant of warranty means a deed which carries the title with it. In *Porter v. Noyes*, 2 Green, 22 [11 Am. Dec. 30], it is decided that a contract to make a warranty deed, free and clear of all incumbrances, is not satisfied, unless the grantor had the absolute title. In *Gastry v. Perrin*,¹ 16 Johns. 267, it was indeed ruled, that a good and sufficient deed means only a deed to convey what title the grantor had. This last case even would be sufficient for this point in the cause, as the defendant had good title before he conveyed to Hawkins. Indeed it would seem to be trifling with the good sense of the law to hold that a warranty deed means a deed that the grantor knows conveys nothing; and it would be giving judicial countenance to fraud, to rule that a man may discharge a legal obligation by giving a second deed of land that has already passed to another by the

1. *Gastry v. Price*.

first. This bond, therefore, required a deed that should convey the land.

But it is further objected, that the replication which assigns the breach should have averred a readiness in the plaintiff to pay the money and execute the notes. In 1 Chit. Pl. 317, it is said: "On averring an excuse of performance by the plaintiff, he must state his readiness to perform the act and the particular circumstances that constitute such excuse." There can be no doubt that the giving the deed, and the paying the money, and executing the notes, were to be concurrent acts, since the absurdity of some old decisions on this subject was fully exploded in *Goodnow v. Nims*,¹ 4 T. R. 761, and that a party could not be forced to part with his money without at the same time having his deed; and that, therefore, after defendant had conveyed the land to another, the plaintiff was not bound to make a tender of the money or notes, upon the same principle that the plaintiff, in an action on a promise to marry on request, when the contract has been violated by the defendant's having married another, is not bound to aver a request that could not be granted. Yet the forms are, that the plaintiff "hath always from thence continued sole and unmarried, and hath been for and during all the time aforesaid, and still is, ready and willing to marry the defendant."

To prevent the "still is" from being a wanton surplusage, it must be taken with the qualification, if it were morally possible, and thus showing a continuance of the original desire, and that the contract was not rescinded by mutual consent.

So in the case at bar, the allegation against the defendant is, that he by selling the land deprived himself of the power to perform, which is equal to a refusal; and if the plaintiff was ready and willing on his part, the bond was forfeit. But if the plaintiff was neither ready nor willing, that is, was not able and did not wish to pay for the land, then it would have been no benefit to the plaintiff for the defendant to have kept it. There was no damage to him by the sale. It is true that in *Sir Anthony Maymie's case*, reported in Cro. Eliz. 479, and in Coke's Abridgment, 138, it was resolved, "that if a man seised of lands in fee covenant to enfeof J. S. upon request, and after, he maketh a feoffment of the same to a stranger, in this case J. S. may have an action of covenant without request;" and the same report in Coke even says, "that when the enfeofment was to be on a particular day, and he that was to enfeof passes the land to another, the covenant is broken, although he pur-

1. *Goodnow v. Nims*.

chase the land again before the day;" and as reported by Croke it is said, that the plaintiff was to make a surrender of his lease, and the defendant to make him a new lease, but the defendant had leased the land to a stranger. "The defendant being disabled to make a lease, the plaintiff needed not tender the surrender unto him." But the general principle that is to be gathered from the various authorities seems to be, that where the defendant has disabled himself from performing, the plaintiff, whether the condition or the act which he was to perform was precedent or concurrent, need not perform it, as the law requires no man to do a nugatory act; that is, he need not tender a performance, for that is properly an act, and to do it would require some useless trouble or expense; but to dispense with the averment of being ready and willing, would, we think, be a departure from all the forms, and not authorized by any authority that has been cited or recollected; and as it is not discreet to lessen any more than to enlarge the requirements of good pleading, without strong reasons, which do not exist in this case, as the merits are not involved in this point, we adjudge the replication to be insufficient.

Upon the common counts, the plaintiff claims to recover the money and other property paid in advance towards the land, at the time the bond was executed, on the ground that the act of deeding the lands to a stranger, by the defendant, was at the option of the plaintiff a rescinding of the contract. This is objected to because the contract was under seal, and therefore this claim is merged. But for this, it would be among the common cases of recovering back the deposit, where the vendor was unable to perfect the title. No authorities have been shown supporting such a distinction, and there seems to be no good reason why the form of the original contract can be of any importance after that contract has been rescinded or abrogated. In *Distrass v. —*,¹ 1 Dall. 428, it was decided, that money had and received would lie to recover back the consideration, where there was no such land, as described in defendant's deed. In *Weaver v. Bently*, 1 Cai. 47, which was an action of assumpsit to recover back the consideration paid on an agreement under seal, Judge Kent says: "The question will be, whether the defendant having failed to perform on his part, the plaintiff may disaffirm the contract and resort to his assumpsit to recover back what he had paid. We are of opinion, that he had his election either to proceed on the covenant and recover damages

1. *D'Utricht v. Melcher*.

for the breach, or to disaffirm the contract and bring assumpsit to recover back what he had paid on a consideration which had failed." Whether the principle should be extended to the mere failure of performance, may admit of doubt; but in this case, where the defendant has done an unequivocal act of rescinding on his part, and the plaintiff is content so to regard it, and go only for his advances, that being the most favorable for the defendant, we think that the law as well as justice will permit it.

Judgment of county court, as to the demurrer, affirmed; and as to the issue in fact, reversed.

CONTRACT TO GIVE "GOOD DEED."—The decisions on this subject in this series are collected in the note to *Tinney v. Ashley*, 26 Am. Dec. 624, and *Everson v. Kirtland*, 27 Id. 91 and note.

AVERMENT OF PERFORMANCE OR OFFER THEREOF by plaintiff, when necessary, and when not: See the note to *Tinney v. Ashley*, *supra*.

VINCENT v. STINEHOUR.

[7 VERMONT, 62.]

TRESPASS WILL NOT LIE where the injury is the result of an involuntary act, and no blame attaches to the defendant.

THE COURT IS NOT OBLIGED TO GIVE AN OPINION upon the weight of the testimony.

TRESPASS. Plea, not guilty. The plaintiff gave evidence to prove that while walking on the pathway beside the road, the defendant, who was riding in a sulky, drove on to the pathway and knocked down and ran over the plaintiff. The court refused to charge the jury in favor of the plaintiff, but gave the following instruction: "The parties were legally traveling the road, and the plaintiff has been injured by the defendant, and the plaintiff is entitled to recover, although the injury was not willful, unless the jury are satisfied it was the result of accident unavoidable by the defendant; but there must be some degree of negligence or inattention on the part of the defendant to charge him. Every man in pursuing his lawful business must use the prudence of the most prudent kind of men, and if there was any want of the exercise of this prudence on the part of the defendant, either in using an unsafe horse, or in the manner of driving and using the horse, whereby the event happened, the defendant must be answerable, and the jury would assess the damages; but if the jury were convinced there was no such neglect or want of prudence, but that it was the result of acci-

dent, unavoidable on the part of the defendant, they would find for the defendant." The plaintiff excepted to the charge and to the court's refusal to charge as requested, and the cause passed to this court for revision.

Judge Turner, for the plaintiff.

Hunt and Beardsley, contra.

By Court, WILLIAMS, C. J. In this case the jury must have found, that the injury suffered by the plaintiff was the result of unavoidable accident, and that there was no want of prudence or care on the part of the defendant. They were instructed by the court, that if they found these to be the facts, their verdict must be for the defendant.

The plaintiff contends in this case, that the injury arose from the unlawful act of the defendant. This, however, is taking for granted the very point in dispute. If the act which occasioned the injury to the plaintiff was wholly unavoidable, and no degree of blame can be imputed to the defendant, the conduct of the defendant was not unlawful. From an examination of the case, we find the charge of the court was conformable to the law, and is wholly unexceptionable. The principle of law, which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is, that no one can be made responsible, in an action of trespass, for consequences, where he could not have prevented those consequences by prudence and care. Thus it has been laid down, that if a horse, upon a sudden surprise, run away with his rider, and runs against a man and hurts him, this is no battery. Where a person, in doing an act which it is his duty to perform, hurts another, he is not guilty of battery. A man falling out of a window, without any imprudence, injures another—there is no trespass. A soldier, in exercise, hurts his companion—no recovery can be had against him. In the case of *Gibbons v. Pepper*, 4 Mod. 405, it was distinctly decided, that if a horse runs away with his rider, against his will, and he could not have avoided it, and runs against another, it is no battery in the rider, and he can defend under the general issue. In the case of *Wakeman v. Robinson*, 2 Bing. 213,¹ in trespass for driving against plaintiff's horse, and injuring him with shafts of a gig, it was considered a good defense, that the horse was frightened by the noisy and rapid approach of a butcher's cart, and became ungovernable, so that the injury was occa-

1. 1 Bing. 213

sioned by unavoidable accident. In the case of *Goodman v. Taylor*, 5 Car. and P. 410, which was an action of trespass for an injury done to a horse by a pony and chaise running against it, evidence was given on the part of the defendant, that his wife was holding the pony by the bridle, when a Punch and Judy show came by and frightened the pony, which ran off with the chaise. It was held, that if true, this was a good defense on a plea of not guilty.

It has also been considered, that if a man is entirely deprived of the command of his will and actions, and occasions an injury, he is not accountable for the injury which he involuntarily occasions; as if, from motives of self-preservation, he should jump out of the window of a house on fire, and fall against another; or in endeavoring to save another from inevitable destruction, he should run against some one; or if he is deprived of all control over his will by idiocy, or permanent madness, and should injure another, it is considered as an involuntary trespass, for which no recovery can be had. In the case of lunacy, it has been held, that a man is answerable in trespass for an injury which he occasions to another. This, however, is on the strength of authority alone. To prevent any abuse of this protection, a person is accounted negligent or careless, and blame is imputed to him, if he does not use an extraordinary degree of circumspection and prudence, greater than is commonly practiced, and if he might have prevented the accident. Therefore, where a person is doing a voluntary act, which he is under no obligation to do, he is held answerable for any injury which may happen to another, either by carelessness or accident. On this principle, the case of *Underwood v. Hewson*, 1 Str. 596, was decided. The act of uncocking the gun was voluntary, not unavoidable; a greater degree of prudence was therefore required. The case of a man turning round, and knocking down another, whom he did not see—the shooting an arrow at a mark, which glanced—were of this class. The act was purely voluntary, not one which the person was required to do. In the case of *Leane v. Bray*, 3 East, 593, it was decided only that trespass was the proper remedy, where the injury was immediate; that it was not necessary that the act should be willful; that although the injury happened accidentally by misfortune, yet the defendant was responsible, where it was occasioned immediately by his act, when he was driving the wrong side of the road. In that case it is to be noticed that blame was imputable to the defendant.

We have examined this case more particularly, as the highly respectable and learned counsel for the plaintiff, for whose opinion we entertain a great respect, has urged so strenuously that a party must in all cases be answerable for an injury occasioned by a horse which he is riding, and that the doctrines to the contrary, found in the elementary writers, are only the opinions of the writers, and not founded on adjudged or reported cases. The result of our examination is, that we think there must be some blame, or want of care and prudence, to make a man answerable in trespass; and that where a horse takes a sudden fright, and there is no imprudence in the rider, either in managing the horse or in driving an unsafe horse, and the horse runs against another, and injures him, the trespass is wholly involuntary and unavoidable, for which no action can be maintained. And although a man is held responsible for injuries occasioned by his cattle, as was urged in the argument, it is on the ground that blame is attached to him in not restraining them, that it is his duty to keep them from mischief, and make use of care and prudence proportioned to the necessity of the case. It is on the ground that no blame is attached to him, that he is not responsible for damages arising from the vicious propensity of domestic animals, unless he knew of such propensity, and neglects to take the proper precaution to prevent their injuring others.

Another question has been made in this case—whether the judge should have charged the jury, that from the evidence contained in the deposition of Bascomb, the plaintiff was entitled to recover. Upon this subject it is only necessary to remark, that the deposition tended to prove the facts contended for by the defendant. It does not appear that it was the only evidence in the case. The jury were to determine the facts, and it is clear that the court would not have been justified in saying to the jury, upon this evidence, the plaintiff was entitled to a verdict. The jury, as they believed or disbelieved the testimony of Bascomb, or taking it in connection with the other testimony, not detailed in the exceptions, might have come to the conclusion, that the injury to the plaintiff was the result of unavoidable accident, or that it arose from want of prudence, and returned their verdict accordingly. The court were not requested to express any opinion upon this deposition. It was wholly optional with them, whether to give an opinion upon the weight of the testimony, or as to what facts were proved.

Their neglect to give this opinion can never be urged as a reason for reversing a judgment.

The judgment must therefore be affirmed.

INJURIES OCCASIONED BY ACCIDENT.—That a man should not be made responsible for injuries which he could not avoid, happening while he was engaged in the performance of a lawful act, seems to be a reasonable principle following from the rights of man as a member of society. In the absence of carelessness and of intent to harm, mishaps, springing from the performance of one's duties or from the pursuit of one's rights, are to be regarded as misfortunes to be borne by him on whom they fall. It is conceivable that the rule may work hardship, that the entirely innocent and passive may be injured by the active but no less innocent. But the rule is founded on reason, and is sustained by that public policy which prefers to encourage men in activity rather than deter them from following their vocation through the fear of unforeseen consequences. In a very thoughtful article in the *American Law Review*, vol. 14, p. 1, O. W. Holmes, jun., examines the principles on which the doctrine of the above case and others like it are based, and criticises what he calls the strict-responsibility theory—the theory that men act at their peril. This theory finds support in some of the earlier English decisions, and in the more recent adjudication in that country of *Fletcher v. Rylands*, L. R., 3 H. L. 330; but is not adopted in this country. With us, the doctrine of the principal case prevails, and has illustration in many decisions. The difficulty arises in stating this doctrine in such a comprehensive manner as will embrace all the facts to which it has been extended at different times. In the principal case a man was driving in a sulky along the highway, the horse became frightened, dashed on to the path near the street, and injured the plaintiff, who was walking there. There being no want of prudence or care on the part of the driver, he was held not responsible. So in *Brown v. Collins*, 53 N. H. 442, the defendant's horses were frightened by a locomotive, ran upon the plaintiff's land, and knocked down a post. In this case also the defendant was exempted from liability. But where one catches a boy by the arm, swings him around, then suddenly lets him go and causes him to fall against another, who pushes him off on to a hook, the first is made liable for the damage thus occasioned: *Ricker v. Freeman*, 50 N. H. 420; S. C., 9 Am. Rep. 267. So one who, shooting at a mark, injures another, will be liable: *Welch v. Durand*, 36 Conn. 182; S. C., 4 Am. Rep. 55; or one who shoots at a fox and kills a hound: *Wright v. Clark*, 50 Vt. 130.

But if one in shooting at an assailant in self-defense, wounds a bystander, he will not be responsible: *Morris v. Platt*, 32 Conn. 75. The reasons urged for these various decisions suggest the general principle upon which they all turn. In the performance of a lawful act a man is not liable for injuries to another which could not have been prevented by foresight and care. Riding or driving a horse is certainly lawful, and if, notwithstanding the rider's or driver's care, the animal becomes unmanageable and injures a man on foot, it is the latter's misfortune. The shooting cases above cited and others found in the books (see Holmes' article), are based on the danger, not on the unlawfulness of the use of firearms, and of the consequent greater care which their use demands. There is a manifest difference between shooting at a mark or shooting for pleasure and shooting at an assailant in self-defense. The care and precaution requisite in the former cases are not and can not be expected

in the latter. The very exigency which provokes the firing renders consideration for the welfare of others almost absolutely impossible. Chief Justice Shaw, in *Brown v. Kendall*, 6 Cush. 292, quotes 2 Greenl. Ev. 85, saying that "if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable," and decides that one who, while separating his dog and another dog engaged in fighting, accidentally hits a bystander in the eye, is not liable for the injury. This language brings us to the necessity of defining what is meant by "unavoidable" and by "conduct free from blame;" in other words, to the definition of "inevitable accident," the expression met with in many books in this connection. Happily, Judge Shaw, in a subsequent portion of his opinion in the above decision, explains that to make an accident or casualty "inevitable," "it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which he was placed." Here we have the same criterion as was above deduced from other adjudications. In the absence of design or of such care as the circumstances demand, a man is not liable for the unforeseen injuries occasioned by his lawful act. He is without blame, or without fault, as said in *Harvey v. Dunlop, Lelor*, 193, and such injuries are "unavoidable accidents," which, as Judge Field says in the nitro-glycerine case, *Parrott v. Wells*, 15 Wall. 524, must be borne by the sufferer as his misfortune. This understanding of unavoidable accident renders unimportant the elaborate attempts at definition made in *Morris v. Platt*, 32 Conn. 75, and in *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28.

A more lengthy, but not more comprehensive statement of the same principle, is made in *Bissell v. Booker*, 16 Ark. 308, 326, where all the authorities are carefully reviewed. It is there stated as a general rule, that "where one is doing a lawful act, or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others, he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others, but that he is answerable for damages resulting from negligence, or a want of such care and caution on his part." The facts of the case in which this language was used demonstrate the extent to which the principle under discussion is applicable. The action was brought against a number of campers, who were alleged to have carelessly left their fire burning, thereby causing the woods to take fire and destroying the plaintiff's shed and cotton. The defendants had a verdict; but a new trial was ordered on the ground of a misdirection to the jury. In support of the views herein expressed, 2 Thomp. on Neg. 1234, may be referred to.

CLARK v. WATERMAN.

[7 VERMONT, 76.]

ONE WHO CALLS IN A PHYSICIAN to attend a female who was brought up in his house, but whose time was her own on arriving at age, is originally liable to pay for the attendance, especially where other circumstances combine to show that the defendant expected to pay.

ACTION to recover for services rendered in a medical capacity

to Caroline Hubbard while living with the defendant. The opinion states the case.

Sawyer and Weeks, for the defendant.

Reed, *contra*.

By Court, MATROCKS, J. The question is, whether the facts found by the auditors will in law justify the conclusion they came to, that the defendant was liable to the plaintiffs for their services as physicians, in attending upon Caroline Hubbard, then resident at defendant's house. If it was the intention of both parties that the defendant should pay the bill, then it would be a contract to that effect. The employment or request to attend upon the patient was made and often repeated by the defendant, in person. Complaints of the inefficient practice of one of the plaintiffs, and an exchange for the other, like a man acting in his own business, and at last a virtual admission that it was his expectation to pay, by calling for the bill to lay before the town, "to see if they would not assist him;" this appears like an original employment by the defendant, and the plaintiffs' making the charges directly against him is evidence that they so understood it. If these facts were such as it would have been proper, in action of *assumpsit*, to have left to the jury, then they were sufficient for the auditors to act upon. The other circumstances in the case, that the patient had been brought up by the defendant, and although she had been three years out of her time, yet continued most of the time in his family, and "in his employ, without contract or accounting," renders it not improbable that he was willing to render her all needful aid in time of sickness, and that his intention was really such as his conduct naturally indicated. It is true, as contended by defendant's counsel, and as stated by Starkie, "that a master is not liable on an implied *assumpsit* to pay for medical attendance on his servant." Although Lord Kenyon, in *Learman v. Castell*,¹ 1 Esp. 270, ruled he was, yet it had before, in *Newby v. Willschire*, reported in 2 Esp. 739, in king's bench, been decided otherwise; and in *Wennall v. Adney*, 3 Bos. & Pul. 247, it was fully so settled; but never, it is believed, has it been so decided, if the attendance was at the request of the master.

But however that may be, we do not put the case upon the ground of master and servant; but there being a request by the defendant, in his own name, upon the credit of which the services were rendered, it is very much as if the defendant had

1. *Searman v. Castell*.

directed a shopkeeper to deliver her goods; and if he had not added, "Charge them to me," or "I will pay for them," yet he would be chargeable with what was delivered in consequence; certainly, if by any subsequent act it should appear that he expected to pay for them. There seems to have been benevolence and kind intentions in the defendant towards the suffering female to whom he had formerly been in the place of a parent, and who was still an inmate of his family; and he should now meet the expenses those good feelings have occasioned to the plaintiffs; for although their practice was not successful, yet the result was quite professional. We do not mean by this determination to intimate, that a man who, by himself or another, happens to go for a doctor to attend a hired man, or maid, or sister, or friend in his house, is of course liable to pay the bill. In many, and perhaps most of these cases, the person going or sending might be regarded as a mere medium of intelligence that a physician was wanted; but where the proof in the case is sufficient, as we think it was in this case, to authorize the triers to find that the defendant intended, and gave the plaintiffs so to understand, that he was himself the employer, then the original credit was given to him; then he is liable upon general principles, and it not being the debt of another, is not affected by the statute of frauds.

Judgment of county court affirmed.

UTLEY v. SMITH.

[7 VERMONT, 154.]

THE REMOVAL, BY THE KEEPER, OF ATTACHED PROPERTY out of the state, does not dissolve the attachment.

TRESPASS for taking certain articles of personalty. The articles had been attached at the suit of the plaintiff in New York state and delivered to him for safe keeping by the sheriff. The plaintiff having taken the property into the adjoining town of Pawlet, in Vermont, it was there attached by the defendant as the property of the original owner. The court directed in favor of the defendant, on the ground that the removal of the property to this state had dissolved the attachment.

G. W. Harmon, for the plaintiff.

Ormesbee, contra.

By Court, COLLAMER, J. This property was legally attached in New York, and a qualified property thereby created in the officer to the property, for which he was liable to the plaintiff to answer the debt, or to Hartwell if the attachment was otherwise discharged. It is obvious, this liability of the officer would continue both to the plaintiff and Hartwell, though the officer or his agent should convey the property into another state, and if his liability would continue, it is difficult to see why his qualified property, thus legally created, should not also continue and be recognized in a sister state. The legal possession being in the officer, he may deliver it to another for safe keeping, who thereby has the legal possession, the invasion of which is a trespass. The condition in the plaintiff's receipt, that he would return the property to the officer on demand, and that the officer should not be liable to the plaintiff in the case the property should not be returned, does not alter the case, as such would have been the effect had the receipt been silent on the subject.

The remaining question is, inasmuch as the property was delivered to the attaching creditor and was taken by the creditors of the owner, is not the officer discharged from both, and so his qualified property ended, on the ground that the creditor can never claim of him, as he took the property and never returned it, and the debtor can have no claim, as his creditors took and legally held it? This question may first be considered as unconnected with any change of the property from one to another jurisdiction. It has ever been the practice in this state, that the officer makes the attaching creditor keeper of the property if he is a responsible man and willing to undertake the trust. If the above doctrine be true, the debtor might in such case take the property from the creditor with entire impunity. This proves too much and is inconsistent.

In the second place, this attaching officer's liabilities were not ended. If, after settling the plaintiff's debt, Hartwell should call for his property, it would not be a defense for the officer or the plaintiff to say they had removed the property to another state, where it was subject to different process and exposed in a different market, and there it was taken by other creditors. The responsibility and qualified property in the officer did continue, and therefore this action may be sustained.

Judgment reversed.

BURR v. SMITH.

[7 VERMONT, 241.]

UNINCORPORATED SOCIETIES COULD RECEIVE BEQUESTS TO CHARITABLE USES prior to the statute 23 Henry VIII., c. 10.

VOLUNTARY UNINCORPORATED SOCIETIES in Vermont, created for religious purposes, may still receive bequests to charitable uses.

A GIFT OR GRANT TO AN AGGREGATE CORPORATION, without any terms of inheritance, passes the whole property in the thing granted.

THE LAW IN RELATION TO CHARITABLE USES is not founded on 43 Elizabeth nor on any statute, but existed at the common law, and derived its elements from the civil law.

JURISDICTION OVER BEQUESTS TO CHARITABLE USES resides in courts of chancery, and is derived not from 43 Elizabeth, but belongs to the ordinary judicial equity jurisdiction of that court.

JURISDICTION EXERCISED IN SUCH CASES is different from the specially delegated jurisdiction which the chancellor exercises over idiots and lunatics, and over general charities and the visitatorial power over eleemosynary corporations, exercised on petition.

ALL THE POWERS INCIDENT TO A COURT OF CHANCERY in Great Britain reside in the courts of Vermont.

CHARITABLE BEQUESTS ARE TO BE LIBERALLY CONSTRUED to carry into effect the intention of the testator; and where the intent can be discovered, chancery will carry it into execution.

CHANCERY WILL NOT SUFFER AN EQUITABLE INTEREST to fail for want of a trustee to support it.

THAT A CHARITABLE USE IS GENERAL, AND IN SOME MEASURE INDEFINITE, is no objection, unless there is an uncertainty as to the amount, or the general purpose is so uncertain and indefinite that it can not be executed. A bequest to the respective treasurers, "for the time being," of the American bible society, and of other unincorporated societies, was sustained.

BILL in equity, filed by the executors of Joseph Burr, deceased, setting forth the will of the deceased, and that the same had been admitted to probate; that bequests were therein made to the treasurers, for the time being, of several charitable associations, to wit, the American bible society, the American colonization society, the American tract society, the American home missionary society, and the Vermont domestic missionary society; that the respective sums bequeathed to these societies were directed to be paid by the executors "to the treasurer of said society, in five annual installments next after my decease, taking receipts for the same;" and that the other defendants were named in the will as residuary legatees. The bill then stated that demands had been made upon the executors for the legacies by the treasurers of the respective societies, and also by the residuary legatees, who gave notice that they should

claim all the sums of money bequeathed to the societies; that the executors were willing to pay the various legacies when the rights of the respective claimants should be adjusted by a court of competent jurisdiction, and offered to pay the money into court, and prayed that the parties be required to interplead, and contest their rights and claims among themselves. The separate answers of the several treasurers admitted the allegations of the bill, and denied the claims of the residuary legatees. The answer of the residuary legatees admits the facts stated in the bill, but denies the claims of the societies, and demands the money bequeathed said societies as belonging to themselves.

G. Wood, for the special legatees, stated that he proposed to establish the following propositions: 1. That the doctrine of charitable uses was borrowed from the civil law, and incorporated into the law of England, long prior to the 39 or 43 Elizabeth, and was recognized though not enforced in the common law courts. 2. That these equitable rights, which are distinct from the legal estate, were, prior to the said statutes, enforced and protected by the chancellor under his general equity jurisdiction. On the first proposition counsel cited *White v. White*, 1 Bro. C. C. 12, 15; 2 Kent Com., sec. 33; 3 Pet. 481, 482; *Porter's case*, 1 Co. K. 24; *Sanders on Uses*, 62; *Gibbons v. Martinoke*, Poph. 6, 7, 8; *Martindale v. Martin*, Cro. Eliz. 288; 4 Reeve Eng. L. 551. On the second proposition counsel explained the *dicta* of Lord Loughborough in 3 Ves. 726, and of Chief Justice Marshall in *Baptist Association v. Hart's Ex'rs*, 4 Wheat. 35, and to show that no doubt now existed upon the question, cited *Payne's case*, Bridg. Duke, 156, and *Fleming's case*, Id. 163; other decisions affirming this view were referred to: *Pember v. Knight*, and *Pensted v. Reyer*, Duke, 381; *Hynshaw v. Morpeth*, Id. 242. As establishing the general equity jurisdiction of courts of chancery over charitable bequests, counsel relied upon *Attorney-general v. Mayor of Dublin*, 1 Bligh (N. S.), 347; *Moggridge v. Thackwell*, 7 Ves. 86, 87, and insisted that the jurisdiction was not derived from 43 Elizabeth. Having argued these propositions, counsel next urged: 1. That charitable uses, with a fixed definite purpose, are in force in this country as part of the English common law, sustained and protected in courts of equity and supported by authorities in this country: *Terrel v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, Id. 292; *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Beatty v. Kurts*, 2 Pet. 566; *Bartlet v. King*, 12 Mass. 537 [7 Mass. 99];

First Parish in Shapleigh v. Gilman, 13 Id. 190; *Bull v. Bull*, 8 Conn. 47 [20 Am. Dec. 86]; *McCartee v. The Orphan Asylum*, 9 Cow. 479, 481 [18 Am. Dec. 516]; *Free Reformed Dutch Church of Acquacknock v. Executors of Ackerman*, Sax. 40; *Whitman v. Lex*, 17 Serg. & B. 89; *McGin v. Aaron*, 1 Penn. 51. 2. That if this doctrine of charitable uses, and the equitable remedy in relation thereto, is considered as dependent upon the statute of charitable uses, the principles of that statute are in no force here as part of the local common law. It was then argued that there were competent trustees in the case, that the testator intended to use the term treasurer as descriptive, and that he intended one person to take, viz., the person answering that description at his death, as was manifest from the language of the will and from the trust being passive and taking effect immediately. There are proper parties before the court to enable it to grant the relief asked; the attorney-general is not a necessary party: *White v. White*, 7 Ves. 422; *Waldo v. Baley*, 16 Id. 211; *Provost of Edinburgh v. Aubery*, Amb. 236; *Oliphant v. Hendrice*, 1 Bro. C. C. 571; *Campbell v. Radnor*, Id. 271; *Curtis v. Hutton*, 14 Ves. 537; *McIntosh v. Townsend*, 16 Id. 330; *West v. Knight*, 1 Ch. Cas. 134; *Pensted v. Reyer*, Duke, 381; *Coggeshall v. Pellson*, 7 Johns. Ch. 292.

Smith and Robinson, for the residuary legatees. 1. The intention of the testator was to make the bequests payable to the treasurers in their official capacity: *Attorney-general v. Tuncred*, 1 W. Bl. 91; *Morrice v. Bishop of Durham*, 9 Ves. 399; 10 Id. 522; *Attorney-general v. Cook*, 2 Ves. sen. 273; *Unquharth v. King*, 7 Ves. 224; *Piggot v. Thompson*, 8 Bos. & Pul. 147; 13 Johns. 38, 39; 1 Cranch, 345. The bequests therefore are for the uses and purposes of the society, and of course it belongs to the societies to apply the moneys: *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Green v. Dennis*, 6 Conn. 299, 300. There are no *cestuis que trust* named in the will, who are to receive the benefits of the bequests, which, therefore, can not be upheld. These associations are all voluntary, and it is a well-established principle at law that a devise or grant to a voluntary association, or persons in succession not corporate, is void: 1 Swift Dig. 135; Co. Lit. 95, a; Shep. Touch. 235; Pow. on Dev. 337; Com. Dig. 35; *Jackson v. Corey*, 8 Johns. 301; *Hornbeck v. Westbrook*, 9 Id. 73; *Barker v. Wood*, 9 Mass. 419; *Lockwood v. Weed*, 2 Conn. 287; 8 Petersd. Abr. 91, note; *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Attorney-general v. Tuncred*, 1 W. Bl. 91; *De Garcin v. Lawson*, 4 Ves. 433, in note to *Corbyn v. French*,

Story's opinion, 8 Pet. 2. Chancery will not establish a devise void at law. There are not parties here capable of interpleading; a suit must be in the name of the attorney-general on behalf of the unincorporated association: *Attorney-general v. Tancred*, 1 W. Bl. 91; *Attorney-general v. Cook*, 2 Ves. sen. 273; *Merrill v. Lawson*, 4 Vin. Abr. 500. Moreover, if the societies were to become incorporated, chancery has no power in this state to enforce the bequest. The law of charities originated, in England, in stat. 43 Eliz., c. 4; 1 Fonb. Eq. 25, note, par. 1, ed. 1831; Rob. on Frauds, 358 and note; Rob. on Wills, 213; *Attorney-general v. Rye*, 2 Vern. 453; *Attorney-general v. Boyser*, 3 Ves. 726; *Bishop of Hereford v. Adams*, 7 Ves. 323; *Attorney-general v. Jackson*, 11 Id. 365. The statute 43 Elizabeth and the doctrine of charities which obtains in England have never been adopted in this state.

By Court, WILLIAMS, Chancellor. The case before us is not only important on account of the principles which are to be decided, but also as it decides the right to property of some amount. It was argued two years since; but the court did not think proper, on the first argument, to decide a case, where the principle involved was so important, and where the decisions in the several states on the subject had been in some measure contradictory. A change having taken place in the members of the court after the first argument, the case was again heard a year ago. As there were only three members of the court present at that time, and their views on the subject were not alike, it was thought proper to continue the case for further argument; and to prevent any further delay, that it should be heard at this term, by all the judges of the court.

The case now, as heretofore, has been fully and ably argued; and probably all the authorities which have any bearing on the subject, have been brought to our notice. Unfortunately, we are not now agreed. We have endeavored to bestow upon it, both now and at the previous arguments, all the consideration which our time would admit; and although we are not all agreed, we are persuaded that this disagreement arises from the difficulty of the subject itself; and that there is no prospect that at any future time, or by any other court, there would be more unanimity.

It is not to be expected that the court would hereafter ever be unanimous; and there can be no use in protracting the decision to any future period. It can not be necessary, in delivering the opinion of the court, to go into a particular examination of all

the cases which have been read or cited. It is due however to the counsel, as well as to the case, to examine the several points which have been made in the argument, as well as the cases read or referred to, in their support; and if they are not mentioned. it is not because they have not been attended to.

In delivering the opinion of the court, I shall only mention the reasons or authorities which have influenced me in coming to a conclusion on this subject. The other members of the court, who concur in the decree, may have been influenced by other and more pertinent and forcible reasons and arguments.

The different parties who claim these legacies, are brought before us by the executors. The funds to pay the same, are placed under our direction; and we must now determine whether these legacies are to be, or can be paid, according to the intention and direction of the testator, or whether that intention is to be frustrated, and the money decreed to the residuary legatees, because his intention can not be carried into effect under the existing laws.

The first question which presents itself is, whether the several societies to whose treasurers the legacies are directed to be paid, not being incorporated, can receive the legacies for the purposes for which they were given, or whether they can receive and distribute a gift or legacy, given to a public, pious, or charitable use. I shall not inquire whether the uses intended were of that kind which are denominated pious or charitable, as this has not been denied in the argument; and indeed they are strictly of that character which by all the writers, either on the civil or common law, are denominated pious or charitable uses: 2 Domat, 168 *et seq.*

I think we shall find, that societies, or bodies of men, unincorporated, have ever been considered, at common law, as capable of receiving gifts or legacies, to be applied to charitable uses; and that it has been the invariable policy of our state, to consider them as capable. That they were considered capable at common law, is apparent from the fact, that it was found necessary to pass a statute to make void grants in trust for them. The statute 23 Henry VIII., c. 10, declares: "If any grant of lands or other hereditaments, shall be made in trust to the use of churches, chapels, church wardens, guilds, fraternities, commonalties, companies, or brotherhoods, to have perpetual obits, or a continual service of a priest forever, or for sixty or eighty years, or to such like uses, or intents, and purposes, shall be void,

they being no corporation, but erected either of devotion, or else by common consent of the people:" 15 Vin. 481.

The passage of this statute, shows that at common law, the want of a charter of incorporation was no impediment to a body of men, changing from time to time, from receiving and distributing according to the intent of the donor, money, or other property, given or granted for a charitable use.

By the statute of 1 Edward VI., c. 14, all, and all manner of colleges, free chapels, and chauntries, etc., and all manors, lands, tenements, etc., belonging to them, were given to the king. In *Adams and Lambert's case*, 4 Co. 96, where the question was discussed, what chauntries, etc., were given to the king by that act, the distinction between those which were incorporated and those which were not, was recognized, and although it was resolved that the statute only intended such chantry as was lawfully incorporated, or at least, had the countenance or beginning of a corporation, yet it was considered that some chauntries, which existed only in reputation, were by that act given to the king: thus it was said, that when a college or chantry, etc., had such beginning, which might be made a lawful foundation, but for error or imperfection in the penning or proceeding of it, was not in judgment of law lawfully founded, such college or chantry is given to the king by the said act; but when they existed only in reputation, they were not given to the king. Several instances are there mentioned, where lands are given for the use or purpose of chauntries not incorporated.

In *Porter's case*, 1 Co. 21, which is a very prominent one in all the arguments which have been made on the subject of charitable uses, and to which our attention will be directed in another part of the case, we find the existence of such societies or companies not incorporate, very distinctly recognized. The testator had devised certain lands to his wife, upon condition that she should assure, give, and grant the same for the maintenance and continuance of a certain free school, certain almsmen and women forever. The condition was not performed, and the heirs entered, and granted to the queen. Porter, who held under the devisee, claimed the land upon the ground that the condition in the will was against law, and so the estate was absolute in the devisee. It was argued for him, that though the object was a work of charity, and good in itself, yet that the statute of 23 Henry VIII., c. 10, was intended to abolish good uses as well as others, that the intent of the statute was for the

benefit of the lords, and that feoffments made to the use of companies not incorporate, were as prejudicial to lords as alienations in mortmain.

Sir Thomas Edgerton, who was then attorney-general, and Sir Edward Coke, for the queen, contended that the use was not void; that neither the act aforesaid, nor any other laws of Henry VIII. or Edward VI. were intended to abolish good or charitable uses, but that they were intended to be maintained—that it would be dishonorable in the law to make such good uses void; and they said, that almost all the land belonging to the towns or boroughs, not incorporate, are conveyed to several inhabitants in trust and confidence to employ the profits to such good uses as repairing highways, repairing the church, maintaining the poor of the parish, etc., and they seriously contended that the statute of wills, by excluding bodies politic and corporate from being devisees, intended to make companies not incorporated capable of receiving a devise. It is to be remarked however, that on this latter point, the court did not deliver any opinion; yet the court decided, that the statute was not intended to extend to take away the good and charitable use. It is certainly worthy of remark, that all the counsel in the case distinctly recognized unincorporated companies as capable of being *cestuis que trust* in a gift or grant to a charitable use.

In a case decided in the circuit court in the district of Pennsylvania, on the will of Sarah Zane, Judge Baldwin, in an opinion in which he investigates the whole subject of charitable uses, remarks, that the common law requires no charter to enable a body of men in any place, to purchase chattels, or receive donations of money, a chattel interest, or an estate, for the lives of the grantee in land by their name as a body, without other words, “that a charter is necessary, to enable them as a natural person, capable of enjoying an estate in fee, without words of inheritance,” to which it may be added, that to enable them to have perpetual succession, or to receive goods or personal property in succession, probably an act of incorporation is necessary. In this state, it appears to me, that a decision that a company of individuals are incapable of receiving gifts, for a public or charitable purpose, or that such a society should not be protected in the enjoyment of property given to them (and I can make no distinction between protecting them in the enjoyment of property of which they are actually in possession by gift, and enabling them to recover that

which is bequeathed to them by will), would be at variance with all our received ideas since the establishment of the state—at variance with the constitutional provisions made on the subject, and directly at war with the principles of religious freedom. It has always been the practice in this state, and may be considered as their settled policy, to encourage voluntary associations for public, pious, and charitable purposes. All corporations at times, and religious corporations at all times, have been viewed with a jealous eye. It is very rare that any acts constituting an ecclesiastical or eleemosynary corporation, or for any religious purpose whatever, have been suffered to pass the legislature. But a few years since, when an act incorporating “the Baptist general convention,” which was solely for the management of their funds, had passed the house of assembly, it was met in the council, by reasons so able and so unanswerable, that there was no further disposition to press the subject upon the consideration of the legislature. It has been considered by community generally, that associations may be formed, money subscribed and collected, property given and received, for the promotion of any cause interesting to the public, and designed to subserve their interests, or for the encouragement or promotion of charity, morality, learning, or religion.

So far as it respects the support of religious teachers, or ministers of the gospel, the spirit of our constitution and laws has for a long [time] been considered as opposed to any legal provision. And although laws were formerly passed for the support of the gospel, and making provision by law for collecting taxes for their support, yet these provisions were rejected by most of the religious denominations among us. They created so much dissatisfaction, that their repeal was imperiously demanded, both by public sentiment and by the constitutional tribunal, whose duty it is to inquire whether the constitution has been regarded. Our statute for the support of the gospel, passed in 1797 and in 1814 (pp. 600, 601, of statute), yet contains a provision, that voluntary associations for hiring a minister, or erecting a place of public worship, or for the settlement and support of a minister, may for some purposes become a body corporate. Yet it is believed that a great, if not the greater part of our religious teachers, are supported and maintained by voluntary associations, who do not avail themselves of the provision of the statute to become incorporate. Associations for all public, pious, and charitable purposes, have taken subscriptions, held property which has been given to

them either by contribution or otherwise, and performed all and every act necessary for the objects contemplated by their association, without any doubt being entertained of their ability so to do. Legacies have been given for public and charitable purposes, and no questions made as to their legality or validity. Every constitution of government which has ever existed since we became a state, has recognized these voluntary associations as deserving of encouragement, and has considered them as standing on the same ground, whether simply united as a voluntary association, or incorporated by an act of the legislature. The forty-first section of our constitution provides, "that all religious societies, or bodies of men, that may be hereafter united or incorporated, for the advancement of religion and learning, and for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct."

I think it may at least be said to admit of a doubt whether this clause in the constitution does not, in fact, give to all voluntary associations, for the purposes therein expressed, more extensive and large powers, than have ever been claimed for the associations who are made the subjects of the bounty of Mr. Burr in this will. All that is asked for by these associations is, that they may receive, for the purposes of their association, either a gift of money from a person living, or legacy from him, to be paid after his decease. It may be contended, that this clause in the constitution is intended directly to place bodies of men, united for the purposes there mentioned, on the same ground as bodies incorporated, so far as to enable them to receive property given to them, and protect them in the enjoyment thereof, subject only to be regulated by the general assembly, by some general law, applicable to all such associations, whenever the public interest should require such regulation. And until such law should be passed that they should be left free to receive, hold, and enjoy all such estates as might be acquired by them for the legitimate purposes of their associations.

Leaving this part of the subject, however, to be disposed of whenever it shall become necessary to decide upon it, I shall only remark, that no legislative provision is necessary to enable any body of men to avail themselves of the benefit of this clause in the constitution. The legislature may regulate, or they may restrain within proper limits, all these societies; but their aid is

not necessary for the purpose of enabling the bodies of men united for the purposes contemplated by the constitution, to enjoy what the constitution has guaranteed to them. To decide or declare that a charter or act of incorporation is necessary to enable a society or body of men, united for the advancement of religion, learning, or other pious or charitable purposes, to carry into effect the objects of their association, or to be protected in the enjoyment of their estate, would be in effect to decide that our religious liberties were dependent on the will of the legislature, and not guaranteed by the constitution; that the legislature might interfere with the right of conscience, and the free exercise of religious worship, by granting a charter of incorporation, with large powers and capacities to the members of one religious sect or denomination, and withholding such charter from those of a different sect.

Although the legislature have, in the instance before alluded to, for the support of the gospel, thought proper to declare these privileges and immunities, and in some measure to enlarge them by providing that they may become incorporate, yet they have never thought proper either to regulate or restrain them from the freedom of opinion on religious subjects, which it has always been our policy to tolerate and allow. No statutes of mortmain have been passed, as none have been required for the interest of the public—no statute to prevent superstitious uses. We have a better protection against superstition, in an enlightened public sentiment, than from any statutes—no statutes to promote one sect of religion, to the exclusion of another. Error of opinion on this subject is to be corrected by reason and reflection. No statutes to restrain or to encourage charitable donations or legacies, believing that men, as to this, were better able to judge for themselves, than the legislature to judge for them. No fears have been entertained by our legislature, that heirs might be improperly disinherited—that religious societies would grow too rich or powerful—that any one denomination or sect could so far obtain the ascendancy as to persecute the other, or deprive them of the free exercise of their particular opinions or dogmas; but the good sense of the people has been considered as amply sufficient to guard against any evils which might be supposed to arise from the want of legislation. From the neglect of the legislature to make any provisions on this subject, we may infer, that whatever sentiments or feelings individuals may have had or expressed, they at least, as a body, are fully satisfied that no injury can arise here, from

the unrestrained exercise of religious freedom; that they are convinced, that none of the reasons, which in another government dictated the statutes of mortmain, the statutes to restrain gifts to superstitious uses, or the statute to regulate or restrain gifts to charitable uses, have any existence in this state.

Individuals may here associate for the purpose of erecting a public monument, or any works of public utility, any memorial of heroism, patriotism, or valor—they may unite for the purpose of erecting a monument in commemoration of the battle of Bennington, as they have in another state of the battle of Bunker Hill—may erect houses of public worship, print and distribute books, tracts, political or religious papers or pamphlets—may receive subscriptions or legacies therefor, and the law will so far encourage them as to protect them in the enjoyment of whatever may be received or bequeathed for that purpose. The different denominations of Christians, whether Catholic or Protestant, the Jew or Mahometan, may here associate for the purpose of enjoying their particular religious tenets, build churches, monasteries, synagogues, or mosques, and are equally entitled to the protection of the law.

When we are told, then, of the danger of building up a system of charities—of the danger of disinheriting heirs, or of wills or testaments made by persons *in extremis*, and are referred to the statute of George II. as wholly destroying bequests for charitable uses, we can only answer, that when the legislature apprehend any such danger, they will provide against it; and until they do, we must administer the law as we find it to be, without any fear of any such consequences.

In considering the powers and capacities of voluntary associations or companies, I have not considered whether they are capable of receiving goods in succession, or whether they have a perpetual existence, as it is not required by the case before us. The legacies here given and claimed by the associations, mentioned in the will of Mr. Burr, do not contemplate a perpetuity or require a perpetual existence in them; to carry into effect the intention of the testator. It is an attribute of a corporation aggregate, to receive lands or goods in succession, and a gift or grant to them, without any term of inheritance or succession, gives to them, the whole property in the thing granted. Their life is a perpetuity. Hence a grant to them, which in the case of an individual, would only convey an estate for life, is a grant to them and their successors. It is not claimed by, or conceded to these societies, that they can pur-

chase lands in the name of their association, which shall go to those who succeed them, or that they can take a bond or obligation, and maintain a suit thereon by that name, unless they can claim such an immunity or right, by virtue of the constitution before mentioned, which is not here insisted on. It is contended, however, that they may receive a gift of money for a charitable use—that they may be protected in the enjoyment of whatever is thus given, and that if they are disturbed in this enjoyment, they must have some appropriate remedy therefor; and thus far the court are disposed to say, that both by the common law and the usages and practices of this state, as recognized by the constitution, they are capable, and may be protected.

As these associations for public and charitable purposes are found to exist among us—as they have ever here existed, are recognized and provided for, and their immunities and privileges guaranteed by the constitution—as they have always existed both in countries subject to the common law and to the civil law, and a vast amount of property has always been given, and is still given to them, to promote works of public utility, convenience, or ornament, or works or acts of piety, learning, or charity, it is important to inquire whether they can be thus protected in the enjoyment of their property. And here it will be perceived, that unless they can come into some tribunal, provided for the administration of justice—unless some court has jurisdiction over them, they are without the pale of the law, and their whole funds at the mercy of every one who may be disposed to invade them. If their treasurer should squander their funds, or any one who receives their subscriptions should choose to appropriate the money to himself, there could be no tribunal to call them to account. It is believed, however, that they can be protected in the enjoyment of these funds, by courts of justice—that a suit can be maintained against any one who illegally comes into the possession of their property—that a bond or note, given upon good and valuable consideration to them, even by their name of association, might be collected in the name of some proper party, connected with their right to hold money or property given to them, and to maintain actions against one who despoils them of it, must be the right to sue in a court of justice, and to demand before a proper tribunal, legacies given to them by a will. The cases are numerous where associations of this kind have been recognized as entitled to equitable rights, and as competent to come into a court of equity

in the name of one or more of their members, for the benefit of the whole.

In the case of *Terrett and others v. Tylor*, 9 Cranch, 43, Judge Story remarks, that if the plaintiffs have shown a sufficient title to the trust property, the court could grant the relief prayed for—that it can make no difference whether a society was incorporated or not; for in equity, as to objects which the law can not but consider as useful and meritorious, the same reason would exist for relief in the one case as in the other. It is to be noticed, that in this case there was a bill filed by the plaintiffs, as members of the vestry of the church in Alexandria, in behalf of themselves and other members of the church. In *Beatty and others v. Kurtz*, 2 Pet. 566, a bill was sustained in the name of a committee of a voluntary society. Lord Eldon, in *Cockburn v. Thompson*, 16 Ves. 321, and Lord Thurlow, in *Buckley v. Carter*, cited in *Pearce v. Piper*, 17 Id. 11, recognize the same principle. In *Waller v. Childs*, Amb. 526, on a bill brought by the heir at law, to set aside certain charitable bequests, to be paid to the treasurer, for the time being, of a voluntary society, the society was recognized as capable of receiving and disposing of the legacy, and decree was made that the money should be paid to their treasurer. *Wellbeloved v. Jones*, 1 Sim. & Stu. 40, was a bill brought by the trustees or officers of an unincorporated society. Their right to maintain the bill was established, as well as their capacity to receive a legacy for a charitable use. Several cases of a similar import have been decided in the several state courts, which it will be unnecessary to examine at this time. It is sufficient for the present to say, it appears to me that the position is established, that voluntary societies, by the common law, were considered as capable of receiving and distributing money and other property given for public or charitable uses—that they are recognized by the constitution of this state, as existing and to exist for that purpose—as deserving of encouragement, and entitled to protection in the enjoyment of their estates, and that their rights may be asserted in, and by the judicial tribunal.

This view of the subject alone would in my mind be decisive of the question submitted to us in the present case. The whole doctrine, however, in relation to charitable uses, as well as the jurisdiction over them exercised in a court of chancery, has been discussed.

It has been asserted, on the part of the residuary legatees, that the law in relation to charitable uses, as well as the juris-

diction of the chancellor over them, is founded wholly on the statute of 43 Elizabeth, sometimes called the statute of charitable uses. That there is a law, or a series of decisions on this subject, establishing or recognizing a rule in relation to them, different from the rules in relation to other subjects, is unquestionable. It is, however, denied that this rule either is founded on that statute, or grows out of any considerations connected therewith; but rather that it arises necessarily from the nature of the use itself. The statute of Elizabeth does not profess to establish any new law upon this subject. The gift, limitations, and appointments, which were to be carried into effect under that statute, existed anterior to the passing it. The principles of the law itself, as now recognized, as well as some of its most objectionable features, were known in England long before the passing of that statute. The passages which have been read from Domat, the prevalence of this law wherever the civil law prevails, the several cases which will be noticed, the remarks of Lord Thurlow in *White v. White*, 1 Bro. C. C. 15, and the remarks of Chancellor Kent, warrant this opinion. Judge Story considers that the principle of the civil law respecting charities was engrafted into the common law; and Judge Johnson says, that it appears to him demonstrable, that the 43 Elizabeth introduced no new law of charities, and made none valid, not valid before.

From the very nature of the subject, the donations to such uses must be vague and indefinite. The objects to be benefited are numerous, and must be looked up and ascertained, and the relief must be administered according to the direction and judgment of those who are to select the necessitous objects for whose benefit the use is created; and moreover, the charitable uses themselves will be declared according to the spirit of the age in which they are established. We find that there were a great variety of gifts and grants to pious and charitable uses recognized by the statutes, as well as by the decisions of the courts of justice, from a very early period. They mostly, it is true, partook of the religious character of the age, as for the exercise and celebration of divine services, to find chaplains, etc., many of them for hospitality and the relief of the poor; but very few, however, if any, for the establishment of schools of learning, until the time of Edward VI. In almost every reign, we find that this subject engaged the attention of parliament, and that men piously or religiously inclined gave property for the purposes then considered charitable and meritorious.

In the case reported by Sergeant Bendlow, mentioned in *Porter's case*, and in the note to *Porter's case*, which was before the 43 Elizabeth, a variety of charitable and meritorious purposes are enumerated, for which lands, tenements, or hereditaments may be given, the objects of some of which must have been vague and indefinite, such as for the use of poor people, the relief and comfort of maimed soldiers, sustenance of poor people, discharging poor inhabitants of common charges, marriage of poor virgins, etc. Whenever a statute was passed on the subject, it was not to create any uses, but either to restrain or to regulate them in such a manner as that the charitable intent should be preserved, and that they should not become prejudicial to the kingdom.

The doctrine of *cy pres*, which has led to decisions that have very justly been pronounced strange by Lord Eldon and Judge Story, evidently was a principle recognized in the English law at a very early period. In the very able opinion of Judge Baldwin on the will of Sarah Zane, he considers that the statute, *de terris templarium*, 17 Edward II., established and ordained as a principle of the law of England, that lands once given to a charitable use should remain for charitable purposes forever. Certain it is, that the words of that statute, viz., "*Ita semper, quod pia et celeberrima voluntas donatorum teneatur et expleatur et perpetua sanctissime perseveret*," afforded a rule which Lord Coke speaks of with approbation in several of his reports. The doctrine of *cy pres*, or something very similar to it, was there recognized. The original charitable purpose failed by the suppression of the order, and yet the lands were preserved to a charitable use. The order of templars, as we learn from the history of that period, were established at an early day for the purpose of watching the roads leading to the city of Jerusalem, and protecting pilgrims. Their numbers increased, and legacies were annually left to them from every part of Christendom, so that they became rich and powerful. As a measure of expediency and justice, the order was suppressed. In those times of violence, when but little regard was paid to individual rights, we should expect to have seen their possessions seized upon and appropriated to satisfy the rapacity of the powers who then ruled. But the pope, who suppressed the order, thought proper that their property should still be preserved for the purposes for which it was given, and determined to transfer it to the knights hospitalers, and published an ordinance to that effect. The king, Edward II., asserted his

own rights and that of his subjects to the possession, and suspended the execution of the ordinance. He consulted the judges, who determined that all the possessions of the templars had reverted as escheats to the lords of the fee. But an act of parliament was passed, assigning them to the hospitalers for purposes similar to those for which they had originally been bestowed on the templars. It is very evident, that a power was here exercised of appointing a charitable donation to a new and similar purpose, on the ceasing of the one to which it was devoted in the first place. The judges of the court determined that the land reverted to the lords, and yet because it had been appropriated to a charitable use, it was considered that it should still continue appropriated to such purposes.

On the suppression of the monasteries in the reign of Henry VIII., such parts of the lands as had been given to good, virtuous, and godly uses, and been misapplied, were directed to be continued to such uses.

A great object of the statute of Edward I., b, c, c. 14, in dissolving these chapels, chauntries, etc., was, to convert the funds from the uses then considered superstitious, to good and godly uses, as erecting grammar schools, etc., educating youth, etc. It evidently appears to have been a fundamental principle on this subject, that where property had once been given to and used for a charitable purpose, the intent of the donor should be respected and preserved; and where, from reasons of state, it could not be observed in the particular manner by him pointed out, it should be done in such a manner as that it should be preserved for a charitable use.

Now it is of no consequence here to discuss the propriety of this principle, or to inquire whether it was at all times correctly and faithfully observed, so long as we find the principles of the law of charitable uses there existing and acted upon before the statute of Elizabeth was made. In the two instances mentioned, the legacies had been given to the templars, the lands, etc., had been given to the monasteries, the original testators and donors had been long deceased, and they intended to part with their interest in the property bequeathed. Possibly no injustice was done in not permitting this property to revert to the remote heirs and kindred of the donors, and if it had been faithfully applied to new and useful objects, it could not have been a subject of much complaint. Of this, however, we at this age can not judge with any accuracy.

It has been confidently argued that this statute of Elizabeth

made certain gifts to charitable uses valid, which were not valid before; that it has given effect to certain conveyances, which were void before. This opinion is undoubtedly sanctioned by great authority. The language made use of in the early reports gives a strong countenance to this idea. There are, however, not wanting the opinions of eminent judges and chancellors, that the statute introduced "no new law upon this subject, and made none valid not valid before."

It is to be remarked, that the statute does not seem to contemplate giving effect to any charitable donations, not good before; it recognizes them as existing, and as not having been employed according to the intent of the donors. It adopts the terms which had previously been used to set apart property for such purposes, "limited, appointed, and assigned;" the same words which were used in the statute of Edward VI., c., c. 14, "all lands, etc., given, assigned, limited, or appointed," etc., and the same which are used in conveyances for the purposes of declaring, or in the appropriate words, limiting, appointing, the use for which property is conveyed.

Although it must be acknowledged that the court of chancery went very great lengths in declaring certain wills good as appointments, and although they make use of the terms, "utterly void," yet it was not by virtue of any provisions of the statute that these were declared to be good, but rather because those conveyances should have been held good as appointments before the statute, that they were decreed. Thus in *Griffith Flood case*,¹ a devise to a corporation was prohibited by the statute of mortmain, yet the devise was good as a limitation or appointment to a use, to be relieved under the statute, not because it was made valid by the statute, but because it should have been considered good as a limitation or appointment, whether made before or after. *Collisom's case* was of the same kind. The devise was made before the statute of wills, and as a devise of the land, was inoperative; but as a declaration or appointment to a charitable use, it was valid, and had the devise been to the use of an individual, it would have been equally good. Although lands could not be devised, yet uses were considered in some respects as chattels, and as such devisable: *Chudleigh case*, 1 Co. 121.

In the statute of 27 Henry VIII., c. 10, made to remedy abuses, it was recited that the hereditaments of the realm were conveyed without solemn livery by last wills, sometimes by bare

1. Hob. 130.

words, and sometimes by signs in great extremities. That the courts went very great lengths in the application of these words, "limited and appointed," both to conveyances and devises, in order to extend the relief given by the statute of Elizabeth, is very apparent; and some of the cases are not to be reconciled either by the law, as existing before, or declared by that statute; although, undoubtedly, some of these devises might be considered as good upon the ground already mentioned. As late as the year 1707, it was claimed that a will without any witnesses, might be good as an appointment to a charitable use, and the cases above mentioned were relied on as authorities for the position, and the lord keeper took time to consider before he decided against it: 2 Vern. 597.¹ Lord Eldon, who had bestowed more attention upon the subject of charitable uses than any other chancellor, and who had at different times reviewed all the decisions made on the subject from the earliest period, in one of the last cases which came before him, and in which he reviewed the several decisions reported in *Hobart's* as well as *Revell's case*, *Platt v. St. Johns College*,² *Smith v. Stowell*,³ was pressed with the difficulty in considering that the statute of Elizabeth had a retrospective effect in divesting estates already vested. "How," says he, "does the statute make good what was in itself good for nothing either before or after the passing of the statute? Can such a construction be put upon the words which occur in this act as will authorize us to infer that they meant void gifts, limitations, assignments, and appointments?" He came to the conclusion, that it was not clear that these instruments, originally void, were held to be valid by the effect of the statute of Elizabeth, but that there was in the court a jurisdiction to render effective an imperfect conveyance for charitable purposes; that the statute had been construed with reference to such the supposed jurisdiction of the court; so that it was not by the effect of 43 Elizabeth alone, but by the operation of that statute on a supposed antecedent jurisdiction in the court, that void devises to charitable purposes were sustained: *Attorney-general v. The Skinners' Company*, 2 Russ. 407.

The above case was upon the effect of a will made anterior to the statute, and although the chancellor does not express his opinion with decision, yet with Lord Eldon a doubt expressed upon a subject contrary to the common received opinion was equivalent to a declaration of his opinion and a decision. It is

1. *Attorney-general v. Barnes*.

2. *Finch*, 221; S. C. reported as *Anonymous*, 1 Ch. Cas. 267.

3. 1 Ch. Cas. 195.

very evident from the whole case, that he considered the idea which had been advanced, that the statute of Elizabeth had a retrospective operation and made good conveyances wholly void before, was destitute of any foundation. It appears to me, from the examination which I have been enabled to bestow upon the subject, that the law in relation to charitable uses is not founded on any statute, but that it existed at the common law, the elements of which were derived from the civil law, and the principles of it may be found both in the statutes and in the adjudicated cases, long before the reign of Elizabeth.

The origin of the jurisdiction which has been assumed over these charitable uses by the court of chancery may be a subject of more doubt. On the one side, it has been declared that this jurisdiction originated and was wholly derived from that statute; and on the other, that it belongs to the ordinary judicial equity jurisdiction of the court of chancery; and as was remarked before, there is great weight of authority for either position. The subject itself would seem naturally to belong to the jurisdiction of a court of chancery. If the law was known and established in England, as we have already considered, the remedy for the purpose of carrying it into effect could alone be administered either in that court, or a court having equity powers. Chancery always had cognizance of uses and trusts, and it was only in that court that the execution of a use, which was binding on the conscience of the trustees, could be decreed. The courts at common law had no means to compel the execution of a trust. If the estate was granted upon condition to perform a trust, it was forfeited, if the condition was not performed, and the land reverted, as in *Porter's case*, before referred to. If the land was granted upon trust and confidence, to perform a use, as in the case of *Martindale v. Martin*, Cro. Eliz. 288, it did not revert on the non-performance of the trust.

Why should there ever have been a distinction in the remedy to enforce the performance of a trust or use, between those which were limited and appointed to an individual, and those appointed to a charitable use, recognized by the law? The same reason why chancery should take jurisdiction of the one, would require that they should take jurisdiction of the other. Judge Story, in 3 Peters, hazards a conjecture, that *Porter's case* having established a charitable use, not superstitious, to be good at law, chancery, in analogy to other trusts, held the feoffees to uses accountable in equity for their due execution,

and that the inconveniences felt caused the statute of Elizabeth to be passed within seven or eight years. But if we are correct in the position, that charitable uses were good long before *Porter's case* was decided, and some as vague and indefinite as the one mentioned to have been reported by Bendlow, in 5 and 6 Edward VI., as a feoffment to the use of poor people, and in Plowden, 521, 542, there is no great hazard in believing that chancery, in analogy to other trusts, held the trustees accountable in equity, and compelled their execution whenever the subject came properly before them in court. In my view, it can make no difference when this jurisdiction was first exercised, whether it was assumed or usurped under the statute of Elizabeth or before. It properly belongs to a court of chancery, who are to exercise it so as to give effect to the intent of the donors, where it can be done consistently with the rules which prevail in a court of equity. I think, however, it will be found that this jurisdiction was exercised by chancery long before. It is true, but few cases can be found on this subject before 43 Elizabeth, nor are there many cases in chancery reported for some years after, and until the reign of Charles II. There are some cases collected by Tothil in the reign of James I. and Charles I., and some cases collected in Duke, Charitable Uses. The origin of jurisdiction in England is only a subject of speculative inquiry. Their courts possess and exercise the jurisdiction, and have by their reported decisions established a regular and orderly system of law upon the subject, and it is of very little importance to them whether it was derived from that statute or not. Here it is of more importance to ascertain where the jurisdiction was first exercised in courts of chancery; if in those states where the statute has not been adopted, courts of chancery are precluded from taking cognizance of this subject. Before coming to such a conclusion, we ought to be well convinced that it is a clear and decided point.

The idea that the jurisdiction of the court of chancery, upon informations for establishing charities, arose since the statute of Elizabeth, and that prior to the time of Lord Ellesmere, who was made lord keeper in 1596, and lord chancellor in 1603, there were no such informations, was first suggested by the Earl of Roslyn, then Lord Loughborough, in the year 1798, in the case of *The Attorney-general v. Bowyer*, 3 Ves. 726, and I am not aware that it has been suggested by any other chancellor in England. Judge Story attributes this suggestion to Lord Eldon, who was not created chancellor until some years after. The re-

sult of Lord Eldon's researches, evidently led him to a different conclusion, as we may learn from his remarks in *Moggridge v. Thackwell*, 7 Ves. 69, and in *Attorney-general v. The Skinners' Company*, 2 Russ. 407, before mentioned. Lord Thurlow considered that the cases had proceeded upon notions adopted from the civil law, which was favorable to charities; that legacies given to public uses, not ascertained, should be applied to some proper object. Lord Keeper Henley says, that the uniform rule has been, both before and after the statute of Elizabeth, for the court of chancery to aid a defective conveyance to such charitable uses, where the person had power to convey: 1 W. Bl. 90.¹ The same case is reported in Eden, who was a connection of the lord keeper. And there is no reason to believe either that he was mistaken, or that his language is incorrectly reported.

Lord Macclesfield, in the case of *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 119, declares, that it was every day's practice, antecedent to the statute of Elizabeth, to file informations in chancery in the attorney-general's name, for the establishment of charities.

Lord Redesdale, in the case of *Attorney-general v. The Mayor of Dublin*, 1 Bli. Parl. (N. S.) 347, 348, is very full and explicit upon this subject: He asserts, that not only the law, with respect to charitable uses, was the same before, as after the statute; that the jurisdiction given to commissioners, was a new ancillary jurisdiction; that an information by the attorney-general might be brought before, and the controlling jurisdiction of the chancellor over the subject, existed before the passing of the statute; that it was found the commission of charitable uses was not the best remedy, and they resorted again to proceedings, by way of information in the name of the attorney-general.

So far, therefore, as we can learn the opinion of the chancellors in England, with but one exception, they attribute both the law on the subject of such uses, as well as the jurisdiction of the court of chancery, to a period more remote than the reign of Elizabeth. It is to be remembered, that there is excepted from the operation of the statute, a very considerable amount of property bestowed for such purposes. The act was not to extend to any colleges within the universities, or to the colleges of Eton, Westminster, or Winchester; nor to any cities or towns corporate, where there is a special governor of such lands, etc., and

1. *Case of Christ's College.*

it may with propriety be inquired, why should a more liberal rule be introduced with regard to the enumerated indefinite cases, and the excepted cases remain subject to a more rigid system? Who was to exercise jurisdiction over them? Or were the charitable donations or legacies excepted, to be left as they would be in this country, if chancery has no jurisdiction over them, without protection, and no remedy had for abuse or misapplication of the funds?

From the case of *Attorney-general v. Matthews*, 2 Lev. 167, we learn, that charities not within the statute, were enforced in chancery, on the information of the attorney-general. The devise there, was for the good of poor people forever. The commissioners had made an order thereon, which the chancellor quashed, because it being a general charity, the commissioners had nothing to do with it; but it was to be determined in the court of chancery, on the information of the attorney-general, which he directed to be brought, and on the information made a decree.

In the case of *Attorney-general v. Newman*, the court declared, that the king, as *pater patriæ*, may inform for any public benefit, for charitable uses, before the statute: 1 Cas. in Ch. 157.

From the case of *The Poor of the Parish of St. Dunstan v. Beauchamp*, 1 Cas. in Ch. 193, we learn, that resort was had to a court of chancery, who made a decree, in a case where it was doubted whether the order of the commissioners would be complied with; that the bill was filed in the name of the indefinite object of a charity, viz., the poor of the parish; and that a decree was made by the chancellor, on an original bill; and though the reporter adds a query whether such a bill was necessary, the case shows that no doubt was entertained as to the jurisdiction and power of the court.

In the case of *Pember v. The Inhabitants of Kingston*, on the question whether money given to maintain a preaching minister be a charitable use, the lord keeper and the judges decreed, notwithstanding it is not warranted by the statute to be a charitable use, that the same should be paid by the executor, to such maintenance: Tothil, 96.

Other cases might be mentioned, where charities, not within the statute, have been enforced. We shall find also, that there are cases antecedent to the statute of Elizabeth, where the court of chancery exercised jurisdiction, and enforced charities, by their equity jurisdiction. It appears to me that all that is necessary on this point, is to ascertain whether there are any

cases of this kind prior to the statute; for if there are any such, it establishes the fact, that chancery exercised jurisdiction, and shows that it was neither given by, assumed, nor usurped under that statute. Nor is it material to find any one case of their exercising a jurisdiction over vague or indefinite charities. The question is, did the court take jurisdiction under the common judicial equity powers? If they did, they must enforce them according to the nature of the subject. If there was no trustee, the court could appoint a trustee; as no trust is suffered to fail for want of a trustee. If the objects were indefinite, so by far the greater part of the objects of all charitable bequests are. Who were to be benefited by the establishing of chapels and chantries? who, by the establishment of hospitals? who, by the establishment of an institution for the sustenance of impotent men and women, men out of their wits, poor parishioners, for the relief of the poor and needy, etc.? If the court of chancery had power to enforce any charities, they must have been charities of this description; for most of them are of this description.

In the few cases before the statute, which are to be found in Duke, Charitable Uses, we find not only the jurisdiction of the chancellor established, but we find also the elements, or the principles of the system of law, upon this subject, which have been incorrectly attributed to this statute. It is to be observed, that this book contains the readings of Sir Francis Moore, who penned the statute, and who was undoubtedly well acquainted both with the law on this subject, and also with the jurisdiction exercised, both before and after the statute. As this book is not in any of the libraries in this quarter, it may be proper to recite some of the cases which are there mentioned. We find in page 131: "If a man bequeathed eight hundred pounds to three parishes, equally to be let out at five pounds per one hundred pounds by the church wardens of each parish, this legacy is not within this statute, but yet the chancellor may give remedy by equity in chancery. If a man devise that the executors or administrators of his wife shall pay one hundred pounds to be lent out to young tradesmen, this devise is void, because he can not charge the executors or administrators of his wife. But if that wife take another husband, and he hath assets in his hands of the goods of the former husband, those shall be liable to the charitable use; and these observations were made upon a decree in *John Howard's case*, 40 Elizabeth."

In page 155: "If the use were limited for a chaplain, they

may decree by addition, that the chaplain shall be a preacher, so they may appoint the nomination of him to a man of science, as a master of a college, etc., because such things concur in decency and order with the intent of the founder, upon a decree made: 40 Elizabeth."

In page 163: "One Simons, an alderman of Winchester, sold certain lands to Sir Thomas Fleming, now lord chief justice, then recorder of that town, and this upon confidence to perform a charitable use, which the said Simons declared, by his last will, that Sir Thomas Fleming should perform. The bargain was never enrolled, and yet the lord chancellor decreed that the heir should sell the land, to be disposed of according to the limitation of the use; and this decree was made the twenty-fourth of Queen Elizabeth, before the statute of charitable uses; and this decree was made upon ordinary and judicial equity in chancery, and therefore it seems the commissioners upon this statute may decree as much in a like case."

In page 154: "In the eleventh of King Henry VI., a gift was made to the intent to find a chaplain *ad divina celebranda*, until the feoffor, or his heirs, should procure a foundation, etc. There was no employment until the third year of King Edward VI.; and therefore, in the queen's time, one Payne purchased the land as a concealment. After a commission being awarded upon this statute, the commissioners inquired and found the gift, and thereupon decreed the property to another, from Payne; but afterwards this decree was made void by the lord chancellor, because the use limited to find the chaplain *ad divina celebranda* was no use within the statute. But the chancellor, by his chancery authority, may, and did decree the land to the first use."

In a late case reported, 1 Myl. & K. 376, *Attorney-general v. The Master of Brentwood School*, we learn that a decree was made in chancery, in the twelfth year of the reign of Queen Elizabeth, before the statute of charitable uses, at the suit of the inhabitants of the parish of Southweld, against the heir at law, that he should execute a conveyance for the purpose of providing a maintenance of a schoolmaster and poor people, according to the intent of Sir Anthony Brown, as expressed in his will. The master of the rolls, Sir John Leach, expresses himself very decidedly on the subject of that decree: "That at that time, no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust, which a court of equity would then execute."

These cases are certainly sufficient to convince us, that the subject of charitable uses was before the court of chancery, and that decrees were made by virtue of the chancery authority of the chancellor, and upon his ordinary judicial equity in chancery. It has already been remarked, that there are no reports of cases in chancery before that period. It has been said, that although there are many cases cited in *Porter's case*, yet they were all decided at law, and none in equity. But when we consider the hostility which existed about that time, between the court of law and equity, it is not a matter of astonishment that no reference should be had to the proceedings of chancery, in discussing a subject or question of pure law, even if the subject had frequently been discussed in the courts of chancery. It is very doubtful, however, whether the subject had very often been before the courts either of law or equity. When we remember the spirit of the age preceding, and at the time of the reformation, and until some time after Queen Elizabeth was seated on the throne, it is not probable that there were many cases brought before any of the judicial tribunals. Until the time of Henry VIII. the charities were mostly of a religious character, or intimately connected with the religious or superstitious notions which then prevailed, as has already been noticed. It is not probable that up to this time there was much disposition to divert property, given or bequeathed to pious uses, to any other purpose, however wantonly or extravagantly they may have been expended. The right appropriation of that kind of property, was so intimately connected with the religious duties enjoined and performed, that the fear of ecclesiastical censures, which carried more terror than the process of a court of law, probably prevented many misapplications of the property sequestered for such uses; and if the trusts were abused or misapplied by the ecclesiastical bodies who had the management, the chancellor was usually selected from that class of persons; and there were no courts who had either disposition or firmness to resist the religious influence exercised by the clergy. After the commencement of the reformation, other causes operated to prevent any legal investigation of this subject.

Free schools were erected principally in the reign of Edward VI. and in the beginning of the reign of Queen Elizabeth, intended and supposed to promote the progress of the reformation, and hostile to the interest and feeling of that part of the people who adhered to the ancient faith. After the death of Edward VI. and during the reign of Queen Mary, and we may

add for the first years of Queen Elizabeth, it was uncertain what faith would be adopted as the religion of the state. It was undoubtedly supposed, and expected by many, that the possessions of the monasteries, chapels, etc., which had been suppressed by Henry and Edward, would be restored. The tendency of this state of things, was evidently to cause a laxity in the administration of the law in enforcing the charities of that age, and a consequent abuse and mismanagement of the funds. The trustees, either from fear or avarice, may have felt a disposition to convert the property devoted to public uses, to their own private uses.

In the reign of Henry VIII., Edward VI., and Elizabeth, there would be no disposition to enforce those charities which had been given to promote the interest of the Roman Catholic faith; and in the reign of Queen Mary, there would be an utter aversion to favor those schools, which had evidently been founded to destroy the faith which she professed to uphold. It is therefore not a subject of wonder if devises and grants to charitable and pious uses were regarded with no favorable eye—that they should have been suffered to remain dormant, without any attempt to enforce them, either in the courts of law or chancery, or in parliament, from the time of the commencement of the reformation, until it was fully settled, as was the case of the devise which gave rise to *Porter's case*, in 1 Coke, and in the case of the *Thetford School*, which originated the case of *Gibbons v. Maltby*, in Popham, and *Martidale v. Martin*, in Croke.

When the statute of Elizabeth was passed, the times probably were such, as to call for a more thorough and searching remedy than had before been had, to call for an investigation and inquisition in every county and in every diocese. The alms and hospitalities which had been received through the monasteries, had ceased, and there evidently was a general disposition to misapply the funds and abuse the trusts given and created for those purposes. Hence the statute of Elizabeth was passed, designed, undoubtedly, to be directory to the chancellor, recognizing that the property given for purposes strictly charitable, had been misapplied (for it is to be remembered that none of the charities recognized in that statute were of a religious character, except one, viz., for repairs of churches), authorizing him to award a commission to the bishop of every several diocese, to inquire into all abuses or breaches of trust, etc., and to make order concerning the same. The time had come when they could distinguish between such gifts as were proper to be en-

forced in the then state of the kingdom, and such as were not; and the statute was passed accordingly. The proceedings under the statute, however, ceased with the necessity which required its passage. Relief, by original bill, was granted at an early day. An appeal was allowed to the house of lords, and before the passing of the statute of 52 George III., c. 101, giving a more speedy remedy, the proceedings under the statute had ceased.

The case of *The Thetford School* so fully illustrates that there was no adequate remedy at law, and also that at law, charitable uses were recognized, and where the remedy was, that a short history of the case may not be inappropriate. It is reported in Popham, 6, 7, and 8, by the name of *Gibbons v. Maltyard and Martin*, in Moore, 594, by the name of *Gibbons v. Maltyard*,¹ and in Cro. Eliz. 288, by the name of *Martidale v. Martin*.

"In 1566, Sir Nicholas Fulmerston made a will. This Sir Nicholas Fulmerston was probably the same person to whom the revenue and site of a monastery were given, on their dissolution, in the reign of Henry VIII., as he bears the same name, and the dissolution was within thirty years previous. In this will, he devised to his executors certain lands for the term of ten years, on condition that they should find a preacher forever, to preach in the church of St. Mary's four times in the year, at ten shillings for every sermon; that they should erect a free grammar school, and maintain a master and usher, and assure three tenements for the residence of the master, usher, and their successors forever, and for the habitation of four poor people. The remainder in the said lands he devised to Sir Edward Clark and his wife, who was daughter and heir of Sir Nicholas Fulmerston, on condition, that they should, within said ten years, assure lands and tenements in possession, of the value of thirty-five pounds per annum, to the executors aforesaid, or their survivors, for and towards the maintenance of the said preacher, schoolmaster, and usher, and for the relief of the poor persons aforesaid; and if the said Edward Clark and his wife should make default, he then devised that the estate of the said Clark and his wife should cease in said land, and then the said lands, upon such default, should go to his executors before mentioned, or the survivors of them, upon trust and confidence, that they or the survivors of them, should yearly dispose of the rents and profits, in finding the preacher and other charitable works aforesaid."

1. *Gibbons v. Maltyard*.

It would appear from the case, as reported in Popham, that both the executors and Sir Edward Clark were unwilling to carry the will into effect, and probably combined to defeat the same; for we learn, that the executors refused to be executors, and that Sir Edward Clark entered and attempted to assure other land of the value of thirty-five pounds per annum, with a condition, wholly different from that prescribed in the will. The son of the surviving executor commenced an action of ejectment against the person in possession, under the heirs of Sir Edward Clark, who was also heir of Sir Nicholas Fulmerston. We find that Sir Edward Clark claimed the land on the ground that the condition was against law; and if he failed on this point, he then claimed that the executor held the same land on condition; and as they had failed to comply, he, in right of his wife, as heir of Sir Nicholas Fulmerston, was lawfully possessed of the land. It appears, however, from the case, as reported in Popham, Moore, and Croke, that it was decided that though the executors had refused the trust, they should still take the land as devisees; and it was further decided, that the use declared in the will, was not prohibited as a superstitious use, being in favor of learning and relief of the poor, and secondly that the devise to the executors, on the default of said Edward Clark and wife, was not upon condition, for the devise being upon trust and confidence, showed that the testator reposed trust and confidence in them, and would not have the land returned for non-performance of it. Nothing is said how this trust was to be enforced, nor is it suggested that there was no way to enforce it. The courts of law could proceed no further; as between the heir and devise, they determined that the devisee, as trustee, was entitled to hold the land.

The land having been thus decided to be in the devisee on trust, we do not learn what steps were then taken to compel the trustees to perform the trust. But from what we can learn of the subsequent proceedings, we find there was still a disposition to frustrate the charitable intent of the deviser, by withholding a part of the yearly value of the lands; for it seems that afterwards, the case was both in chancery and in parliament, where we learn from Duke, "breaches of trust were to be relieved, although it was a tedious and chargeable remedy" The lands devised increased in value, from thirty-five pounds to one hundred pounds. A private bill was exhibited in parliament in the 7 Jac. 1. It was referred to the justices of the court, who adjudged that nothing should be converted by the

devises to their own use, but that the whole should go for works of piety and charity, and should be employed in performance and increase of the said works of charity: 8 Co. 259.

This case, which evidently attracted some notice at the time, had also been in chancery; for in the preface to *Duke*, by Bridgeman, he says: "As early as in the year 1610, in the famous case of *Thetford School*, it was determined, that where a testator pointed out the particular objects of his bounty, the court of chancery will construe his intent imperative, to be not only in exclusion of his next of kin, but to the disinherit his heir at law. Proceeding upon this principle, the court uniformly decrees the surplus rents and profits to the augmentation of the charities." And he adds: "The same doctrine has prevailed in courts of equity to this day." In the history of this case, we see, that devises to a charitable use were known in the courts of law—that the court recognized them as good, so far as to determine that the estate should belong to the trustees for such uses; and that the trustees were not permitted to baffle the intent of the devisor, or appropriate the property to their own uses; and that both in chancery and parliament, the intent of the devisor could be, and was carried into effect; and that without any aid or benefit from the statute of Elizabeth. But it may be asked, if the law in relation to these uses, existed before the statute was incorporated into their law, and the courts of equity had jurisdiction, what was the necessity of passing the statute? This question has been in some measure anticipated, viz.: that it was to furnish a more effectual, searching, and less expensive remedy. This was distinctly asserted by the counsel in argument of the case of *Attorney-general v. Dixie*, 13 Ves. 522, and not denied.

That the proceeding in chancery was tedious and expensive, we learn from the case of *Hynshaw and others v. Morpeth: Corporation, Duke*, 242. The corporation refused to apply the increased value of certain lands, given for a charitable purpose, for the purposes designated, and refused to appear before the commissioners, claiming that they were visitors, and by the proviso of the statute, exempt from the power of the commissioners. The lord keeper declared, that as they were trustees as well as visitors, they were not within the intent of the proviso, declaring, "that if it was otherwise construed, this breach of trust would escape unpunished, unless in chancery or in parliament, which would be a tedious and chargeable suit to poor persons." The heavy expenses attending at that time a suit in

chancery, we may conjecture, when we are told, that it had been customary to give presents to the chancellors, the amount of which, as disclosed in the trial of Lord Bacon, was great and extensive. Further, about this time, the contest between courts of law and the chancery was at its height, and suitors, particularly such as were benefited by the charitable donations mentioned, would apply to a court of equity with some reluctance, as it was but a few years from this time that indictments were preferred against the suitors, solicitors, and a master in chancery, for questioning in the court of chancery a judgment obtained on the king's bench. Furthermore, the practice of the court of chancery was not at this time reduced to much system—the office of chancellor having been filled indiscriminately, as we are told, by lawyers, churchmen, and courtiers. The jurisdiction over a considerable part of the charities then existing, had been given to other tribunals—some to the court of wards and liveries. The lands of the suppressed abbeys and monasteries were placed in the hands of commissioners, under the superintendence of the courts of augmentation of the king's revenue, and it was customary at that time to proceed in cases similar by commissioners.

The statute of 13 Edward I. provided, that if lands, given for free alms and relief of the poor, were not employed for that purpose for two years, the lands should revert to the donor, and he might have a writ of *cessavit*, which was undoubtedly effectual as to all that class of charities. To furnish a better remedy, one that should extend to every diocese and every county—that should be attended with comparatively a small expense and charge, and of which any could avail themselves by petition, without being subject to the expense of a suit in equity, or without being subject to cost, unless they objected to the proceedings of the commissioners, were undoubtedly reasons sufficient for passing that statute. But whether they are satisfactory or not, is but of little importance, if it is found that the elements of the law of charity were recognized in the courts of England, and the court of chancery exercised a control over charitable uses before. That there has always been a disposition in England to favor devises and legacies of this character, is not to be denied. The very early decision mentioned by Plowden, 523, where the courts of law upheld a devise to St. Andrew's church in Holborn, by construing it as a devise to the parson, who was *persona capax*, evinced this disposition. The whole course of their decisions since, has been in accord-

ance with this idea; and where they have considered a charitable use declared in a will good, and have supplied any defect which existed in the will, for the purpose of upholding the use, they have only acted in analogy to their proceedings in other cases. It is a familiar principle, that this court will aid a defective conveyance. The cases where this subject has come before the courts in this country, are numerous. The law, in relation to charitable uses, is recognized in many of our sister states. And it is alone upon this principle, that many of their decisions can be supported.

The case of *The Baptist Association v. Hart's Executors*, 4 Wheat. 1, though it was truly a question of local law, arising under a statute of Virginia, repealing in terms the statute of Elizabeth, and which was undoubtedly intended to abolish the law of charitable uses in that state, yet it must be admitted, was decided on general principles, applicable to all the states where that statute is not in force. To avoid coming in collision with the decision in that case, the courts have been somewhat astute in endeavoring to make distinctions between that and the case before them. In the case of *Terrell v. Taylor*, before mentioned, which was before this decision, the law upon the subject of charitable uses was recognized. The case of *Ingliss v. Sailor's Snug Harbor*, 3 Peters, 99, it appears to me, can only be supported on the principles of the law of charitable uses. It is placed on the ground of an executory devise by one of the judges, but according to the case of the *Baptist Association*, the devise was void for want of a person to take, and the estate descended to the heirs, and no courts in this country have ever admitted, that property once vested, can be divested.

Judge Johnson, who concurred in the decree in the last case, considered the law, in relation to charities, as existing in the state of New York. Two of the judges, viz., the chief justice and Judge Story, considered the case of the *Baptist Association* as governing the case before them, and dissented. The case of *Beatty et al. v. Kurts et al.*, 2 Pet. 566, was also a recognition of the doctrine, applicable to public and charitable uses. The conveyance, which was the subject of that suit, as the court say, if valid, must have been considered as valid upon other principles than those which ordinarily apply between grantor and grantee. The law in such cases, in the language of Judge Thompson, 6 Pet. 435,¹ applies to those rules adapted to the nature and circumstances of the case. In delivering the opinion

1. *The City of Cincinnati v. White.*

of the court, Judge Story says, that the bill of rights in Maryland recognizes, to a certain extent, the statute of Elizabeth, under which such conveyances would be upheld, although there was no specific grantee or trustee. As to which I may remark, that if the clause in the bill of rights in Maryland, which is rather an exception or recognition of the previous validity of such appropriations (for it is found in an excepting clause to an article in the bill of rights which makes void all gifts for the support of religious teachers, or for the benefit of any religious sect or denomination), is considered as recognizing the statute of Elizabeth, there is much stronger reason for asserting that the clause in the forty-first article of the constitution of this state, before referred to, not only recognizes the doctrine of charitable uses, but the law on that subject, as established by the judicial tribunals in England, and all the principles of the law, not repugnant to the constitution of this state. We are not disposed however to say, that that statute is in force here, although there is not wanting a very high authority for the position.

The case of *Beatty v. Kurtz* is considered by one of my brethren, as distinguishable from the case under consideration, on the ground that each member of the Lutheran society is to be considered as having an interest in the land conveyed. The court, however, do not lay any stress upon that circumstance, in the decision, nor was it urged in the argument.

The case of *The City of Cincinnati v. The Lessees of White*, recognizes the law in relation to dedications of lands to charitable uses, which are admitted to be void, without any grantee. The subject has been fully and ably investigated in New York, and we have the authority of the case of *The Trustees of New Rochelle*, 2 Johns. Ch. 292,¹ and the opinion of Chancellor Jones, in the case of *Orphan Asylum v. McCarter*, 9 Cow. 440, in favor of charitable bequests, and the jurisdiction of chancery over them.

In Pennsylvania, the case of *McGirr v. Aaron*, 1 Penn. 51 [21 Am. Dec. 361], and *Witman v. Lex*, 17 Serg. & B. 91 [17 Am. Dec. 644], recognize the law as existing in that state. The very full and able opinion of Judge Baldwin in the circuit court in that district, on the will of Sarah Zane, where he collects and examines with great industry and ability, all the law, statute and common, with the several decisions there, which, if it is entitled to any consideration as an authority, establishes legacies,

1. *Oggenhall v. Peltory*, 7 Johns. Ch. 222; 8 C., 11 Am. Dec. 471.

so very similar to the legacies in the will under consideration, is conclusive upon the subject.

In Massachusetts, we have the case of *Bartlett and others v. King's Ex'rs*, 12 Mass. 537 [7 Am. Dec. 99], where a bequest to a pious and charitable use was sustained similar to the bequest in this will, in trust for a society similarly organized and constituted, to the societies who are the objects of Mr. Burr's bounty, the case being in no other wise distinguished from this, except that the trustees were named.

There is also the recent case of *Emery v. Gowing* [*Going v. Emery*, 26 Am. Dec. 645], of which we have a manuscript copy, where the statute of Elizabeth is considered as in force in that state.

In Connecticut, we find a legacy to be disposed of among the brothers and sisters of the deceased, as the executors should judge most in need of the same, according to their best discretion, was held not void for uncertainty, and the executor having deceased, a committee or trustee was appointed to execute the trust: *Bull v. Bull*, 8 Conn. 51 [20 Am. Dec. 86].

In New Jersey, in the case of *Hendrickson v. Hicks*,¹ the doctrine of charitable uses was recognized.

In North Carolina, in the case of *Griffin v. Graham*, Hawk. 97 [3 Am. Dec. 619], after a full and elaborate investigation, it was held, that the statute of Elizabeth was in force in that state. That independent of the statute, and though the jurisdiction of the court of chancery in England over charities should be considered as belonging to the court, not as a court of equity, but as administering the prerogatives of the crown, yet the court of equity in that state had the like jurisdiction; and that where there were trustees, and a definite trust, and specific objects pointed out, the court would, as a matter of trust, take cognizance of the same, by virtue of its ordinary jurisdiction, as a court of equity.

In this state, in the case of *Stone, Executor of Fuller, v. Griffin*, 3 Vt. 400, a church or society incorporated, was held to be capable of receiving the use of property, devised to trustees for their benefit. In all these cases, it is apparent, that the courts have endeavored to uphold donations for public, pious, or charitable uses, and to get over all critical, technical exceptions against them, probably thinking that they were part of the voluntary system adopted in this country, for the support of pious, religious, and charitable institutions and associations,

1. Perhaps *Shotwell v. Hendrickson*, Sax. 577, is intended.

and in which we are distinguished from those countries where religion is sustained by force of law, and by extensive church establishments. The weight of authority in the American courts, is evidently in favor of the law of charitable uses, and the jurisdiction of courts of equity over them.

The jurisdiction exercised in these cases is different from the specially delegated jurisdiction which the chancellor exercises over idiots and lunatics, and over general charities and the visitatorial power over eleemosynary corporations, which is exercised on petition. Where there is a general charity, as a devise to pious and charitable uses, the king may dispose of it; and the course is, to apply to the king by petition for a sign manual: Amb. 712.¹

A court of chancery, as such, has no jurisdiction to remove the officers of a corporation, but where the crown become visitors for want of an heir of the founder, and the removal of the officers is sought, it is by petition to the great seal. This jurisdiction is like that exercised over idiots and lunatics by the chancellors, as the representatives of the king. It is a proceeding before the chancellor, and not in the court of chancery, as was said by the master of the rolls: *Ex parte Dann*, 9 Ves. 547.

The proceedings in charity cases are usually before the court of chancery, under their general equity jurisdiction. In the case of a petition to the chancellor, no costs are taxed. On bill or information in the court of chancery, costs are allowed. It is to be remembered, that this distinction has been made, that where there is a bequest to trustees, for charitable purposes, the disposition is made by a court of chancery, and a scheme is laid before the master. Here, I apprehend, the court act on their general equity jurisdiction. But if no trust is interposed, and the disposition is to charity generally, an application must be made for a sign manual; and on this, the chancellor acts as the specially delegated officer of the crown.

It is however, somewhat immaterial here, under what head this jurisdiction is exercised; although I have no doubt it is under the general equity jurisdiction of the court of chancery, the same which is exercised over other trusts. We have all the powers incident to a court of chancery (Stat. 123); our rules are to be conformed to the rules and precedents established in courts of chancery in Great Britain, so far as is consistent with our constitution and laws, and

1. *Attorney-general v. Harrick.*

we can exercise all the jurisdiction over infants, lunatics, charities, etc., which are exercised by the chancellor or the courts of chancery in Great Britain (except that which is delegated to other tribunals), exercising them according to our law, and not according to their statutes. Believing that the principles and elements of the law, in relation to donations to charitable uses, was known and established in England long before the statute of Elizabeth—that gifts and grants may be made for purposes of relief to the poor, and for upholding charitable purposes, having in view the moral, intellectual, and religious improvement of the objects which are from necessity general, uncertain, and indefinite—that communities and associations might be united for the purpose of receiving these donations and distributing them—that they are within the jurisdiction of a court of equity, which by its constitution and rules, is alone adapted to carry them into effect; and believing also, that the law, which has been built and established by a series of doctrines, as well as the jurisdiction, does not necessarily arise, or grow out of that statute, we believe that many, if not most of the decisions, in cases which have been before the court of chancery, are applicable to this country, and are authorities here. Nothing further will be necessary than to compare the legacies given in this will with those which have been established as valid by decided cases, and from them learn whether they are such as can and ought to be carried into effect, in the exercise of our equity jurisdiction. How many of the cases which have been decided on the doctrine of *cy pres*, are incompatible with our free institutions, it is not necessary here to inquire or decide. One thing however may be confidently affirmed, there are no reasons of state, no considerations arising from an established religion, requiring us to refuse to carry into effect a bequest to a charitable use, lest it should tend to propagate a false religion.

The decision in the case of *The King v. Lady Portington*, 1 Salk. 162; 3 Id. 34, would not be considered as compatible with our free and liberal ideas on the subject of religion. A jew might here give his property for building a synagogue, and we should not appropriate it to building a foundling hospital: Amb. 228.¹ We should be loath to decide, that a devise for bringing up poor children in the Roman Catholic faith, was void; and yet declare that it should go to such uses as others might direct: 7 Ves. 490.² But when we do find a charitable

1. *Da Costa v. De Pas*.2. *Cary v. Abbot*.

intent, and property given for any public, pious, and charitable use, tolerated among us, and we can carry it into effect in the exercise of our equitable jurisdiction, as a court of chancery, we ought to do it; and more especially, we should hesitate about giving the property, left by a testator, to those who were not considered by him as in any way entitled to it, and disappoint his pious and charitable intention, which probably afforded him a consolation in his departing hours.

On examining the authorities upon this subject, some of the cases will be found directly applicable to the case under consideration, and embracing almost every point raised in the argument. These general principles have been established, which seem to rise necessarily from the nature of the subject—that the court are to be liberal in the construction of charitable bequests, to carry into effect the intention of the testator—that where they can discover the charitable intent, they will carry it into execution, and support the charitable purpose—that they will not suffer an equitable interest to fail for want of a trustee to support it; and that it has never been considered as an objection to a charitable use, because it was general and in some measure indefinite, unless there was an uncertainty as to the amount intended to be given, or the general purpose was of so uncertain and indefinite a character, that it could not be executed: the instances of which, will be mentioned.

In the case of *Attorney-general v. Clarke*, Amb. 422, a legacy to the poor inhabitants of St. Leonards, Shoreditch, was sustained, although there were no trustees or persons to select the objects named in the will. In this case, a reference was made to the case of *Attorney-general v. Rance*, where a legacy was given to the poor, without designating what poor. As the testator was a French refugee, it was given to the poor refugees. Similar to this was the case of *Powell v. Attorney-general*, 3 Meriv. 48, where a bequest to the widows and seamen of the town of Liverpool was sustained.

A bequest to the widows and orphans of the parish of Linfield was objected to, for that the description of the persons was too general and uncertain. It was held good as a gift to the poor widows, etc.: *Attorney-general v. Comber*, 2 Sim. & Stu. 93.

In the case of *Attorney-general v. Hickman*, 2 Eq. Cas. Abr. 123, the persons who were to relieve the objects of the charity deceased in the life-time of the testator, and yet the legacy was sustained. The use declared, was for the encouragement of

such non-conforming ministers as should preach God's word in places where the people were not able to allow them a sufficient maintenance. The testator left the disposition of this charity to persons who died in his life-time. The chancellor, Lord King, said the charity which was the substance of the devise, remained, notwithstanding the death of the trustees, and could be administered by the court, as well as if the legatees was alive.

The case of *Waller v. Childs*, Amb. 524, is very similar to the present. This was a bill brought by the heir at law, against the executors and trustees, to set aside the charitable bequests. The directions in the will were to pay to the treasurer or treasurers, for the time being, of a society or fund, for the maintenance and bringing up of dissenting students for the ministry of the gospel. It appears there were three denominations, viz., the Presbyterians, Independents, and Baptists—each of which had a society, consisting of persons chosen out of their congregations, called the managers of the fund, for the support of pious dissenting ministers of their denominations; that collections were annually taken up and put into the hands of the treasurers thereof, for the time being. This bequest was objected to as void for uncertainty. The court decided in favor of the charity, and ordered the money to be paid to all the treasurers of these denominations, upon the trusts in the will. This case, unless it was founded on the statute of Elizabeth alone, certainly covers the whole ground contended for by the different societies in this case.

The case of *Attorney-general v. Stepney*, 10 Ves. 22, where a bequest to the Welsh circulating charity school for the increase of Christian knowledge, and promoting religion, and to purchase bibles and other religious books, pamphlets, and tracts, as the trustees should devise, was held to be a good bequest, subject however to such checks as might be consistent with the religious establishment of the kingdom, but which would not be required in this country.

These cases are a very few, selected out of a great multitude, to show that the remarks of Godolphin and Swinburn, made long since, "that testaments to pious uses are not void in respect of uncertainty, as other testaments are," is still recognized as the law upon that subject. The cases where legacies have failed for uncertainty, either as to the amount intended to be given, or of the uncertain and indefinite purpose of the charity, are none of them similar to those under consideration.

In the case of *Brown v. Yeale*, 7 Ves. 50,¹ the bequest was for the purchase of such books as may have a tendency to promote the interest of virtue and religion, and happiness of mankind; and was determined to be too indefinite to be executed by the court. The correctness of the application of the principle to that case, was however doubted by Sir William Grant and Lord Eldon: 9 Id. 399.² A bequest "for such objects of benevolence or liberality as the bishop should appoint:" 9 Id. 399;³ "for such benevolent purposes as the executors might agree on:" 3 Meriv. 7;⁴ a bequest for such charitable or public uses, or to any person or persons, as the trustees might direct: 1 Sim. & Stu. 69,⁴ were held void, as uncertain and indefinite. In all these cases, there were no specific objects or purposes of charity—no charitable purposes designated; and as they were general and indefinite, and could not be executed, the legacies failed for uncertainty.

The distribution of charitable donations, it appears also, may be made by persons unincorporated, and who are shifting from time to time: *Baylis and Church v. Attorney-general*, 2 Atk. 239. The lord chancellor observed, that though the aldermen and inhabitants are not in point of law a corporation, yet as the attorney-general was a party, he made a decree that the money should be disposed of as the aldermen, for the time being, and the principal inhabitants should think most beneficial.

In the application of the principles of the law, and these various decisions, which are selected from a great number (for the subject and the authorities have been fully and ably sifted in several cases within a few years previous to the case before us), we shall find, that the legacies in the will of Mr. Burr are established beyond all controversy, if these decisions are to be recognized as authorities upon this subject in our courts. These different societies have been long known, united, and associated, precisely the same as similar societies have for a long time existed for similar purposes; not incorporated, because they are better adapted to the ends of their associations, without an act of incorporation. The objects of their association are defined and certain, and the members are generally those who contribute their funds to, and are from sentiment and duty friendly to the objects of their association. The purposes are such as have been considered as charitable by the decisions of courts of chancery and law, and have been recog-

1. In note to *Moggridge v. Thackwell*.

2. *Meriv. v. Bishop of Durham*.

3. *James v. Allen*, 3 Meriv. 17.

4. *Vesey v. Jamson*.

nized as such both before and after the statute of Elizabeth, and are more definite than many enumerated in *Porter's case*, for which lands, tenements, and hereditaments may be given, and much more so than a great portion of those which have been adjudged to be good charitable uses from the time of Edward I. to the present time. The funds are usually expended under the direction of a board of managers or directors. The due administration of them can be enforced, and the maladministration prevented or punished in a court of chancery. If the objects of the society are such, for which money may be lawfully given, what better way could be devised to promote that object than to employ these societies, already organized and in operation, for that very purpose?

If a scheme was to be submitted by a master to carry into effect the objects intended by this will, I can think of none so good as to direct the legacies to be paid to the societies already in existence. The testator having constituted these societies, or their managers and directors, the almoners of his bounty, to expend the legacies for the objects contemplated in their association, this court can decree the money to the amount of the legacies, to be paid them, either on the application of the state's attorney, or on the application of any of the members of the societies, in behalf of themselves and their associates. If it was a perpetual fund, the annual income of which alone was to be appropriated, the court would find some way to perpetuate the fund, and apply the income. The societies in this case, are to receive and distribute the legacies, according to the intention of the testator, for the purposes of their association. They receive nothing for their own benefit or their own individual use. The individual persons, who are to be ultimately benefited, are of course undefined and unknown. The managers of the bible society, of the domestic missionary society, the colonization society, and the tract society, are sufficiently described, according to the case of *Bartlett v. King*, 12 Mass. 536 [7 Am. Dec. 99], and the objects as fully pointed out as in the case of *Attorney-general v. Stepney*, 10 Ves., or *Attorney-general v. Comber*.¹ They are competent to expend this property, which is not given as a perpetual fund, but for immediate distribution, responsible both in conscience and law for their fidelity in executing their trust.

Having the view already expressed, of the law, of the jurisdiction of the court, and the nature of these legacies, we must

1. 2 Sim. & Stu. 93.

of course come to the conclusion, that if there was a devise of real estate, directly to these societies, or the annual income of the estate was devised to them, we should decree a sale, if necessary, and the proceeds paid over, or substitute a trustee to support the fee. It being however a devise of money not for the purpose of a perpetual fund, I can see no objection in decreeing the money to be paid to the one who ordinarily receives and keeps the funds of these societies, or to the treasurer for the time being, whoever he may be, as was done in the case of *Waller v. Child*.¹ But inasmuch as the testator has directed that the legacies should be paid to the treasurers of the societies for the time being, whose receipts are to be a sufficient discharge, the court have considered that whoever was designated to that office or appointment, on the death of the testator, is the person or trustee to whom the legacies are to be paid, and who is capable of receiving the legacies as they become due, for the use and benefit of these societies, to be disposed of by them for the objects contemplated in their associations, agreeable to the intent of the testator, and the solicitor may draw a decree agreeable to the minutes herewith furnished.

In this result, I am authorized to say, that a majority of the court concur.

MATTOCKS, Chancellor, dissenting. The amount of property involved in this case has elicited much industry in the preparation and great talent in the argument. The case has been several times argued, but the court have never been so fortunate as to come near unanimity; and upon its decision, the minority not being a solitary individual, it relieves me, as I agree with the learned judge who has dissented, from going into the case in detail, which indeed, from the great learning which the counsel have displayed, would be quite above my ability. Yet the importance of the question, and the fear that the precedent may lead to dangerous consequences, and having left the court before the decision was pronounced, induces me to record some of the reasons of my dissent, without pretending to discuss the whole subject. For it may happen that a judge as well as a juror may feel that it is his duty to resist the conclusion which has been ingeniously urged upon him, without having learning enough to detect all the errors in the process.

Among the points presented in writing by one of the able counsel for the societies, at the last term, were the following:

1. Amb. 524.

"9. In the case of a charitable use, like other trusts, there must be a legal estate to support it.

"10. The testator has vested the legal estate in these money legacies in question, subject to the charitable use, in the treasurer for the time being, viz.: the time when the legacy is to vest."

The ninth proposition, although it has not, I believe, been repeated by the gentleman this term, I regard as the frank admission of a good lawyer, made from a conviction that it was undeniable, and which satisfied me of its truth.

The tenth being an adverse proposition, required to be proved; and if that is made out, the generous advocate has lost nothing by the ninth. On this tenth point, in my view, hangs all the law and the equity that should govern the case; for if the property was vested in the societies, or their treasurers, it should be decreed to them, and if necessary, they should be protected in the enjoyment of it, by expending it in works of piety and charity, according to the benevolent intentions of the associations. If not, the residuary legatees are fairly entitled to it for their benefit, according to the undisputed powers of the court of chancery relating to legacies and trusts.

I am satisfied, from the arguments and authorities cited, that no legal estate passed by will to the societies or the treasurers, nor any individuals who have been or will be treasurers; and as I understand that to be the opinion of a majority of the court, I am not a dissentient on this point, and therefore it is not my province to state the grounds of this opinion.

The arguments that are the most strongly urged at this term are, that it is within the power and is the duty of this court, as a court of chancery, to sustain these bequests as appointments to pious and charitable uses, if they are not supported by the law; that we are warranted in doing this by the civil law as adopted by the English courts of chancery before the statute of Elizabeth, or at all events after; and that the spirit of the statute has descended to us, and if absolutely necessary, the statute itself.

Lord Mansfield, it has been said, would resort to the civil law when straitened. The Roman law, in its day, was wise and potent; but when the numerous popish clergy who followed William the Conqueror, and engrossed all the offices in the realm, being ignorant of the laws of England, introduced the civil law, and intermixed it with their own canon law, it was seen to be favorable only to the monkish clergy, who were de-

lighted with it; but it was universally resisted by the nobility and laity. But the pope, with his enthroned archbishops and installed bishops, was an overmatch for the nation, and in the fourth reign from the conquest, fastened these laws upon them, together with an appeal to the court of Rome, as a part of the common law; and it is remarkable that at the reformation, in lieu of abolishing the canon law, the statute of 25 Henry VIII. established it when not repugnant to the law of the land or the king's prerogative, until a new canon law should be made, which not being done by the 1 Elizabeth, that statute was revived and confirmed, and there having been no canon law of the land before the popish, and none having been substituted since the reformation, it seems the protestant episcopal church in England is still governed by the canons of the mother church.

But the civil law, save such part as has become canon, has not been established by act of parliament, and if it had, with the same exceptions ("when not repugnant to the law of the land"), would not affect the construction of wills, upon which the common law is not silent, and to the courts of which the chancellor himself often resorts for aid. The civil law, as such, has no force in England, except from usage in some particular cases, and in some particular courts, where they have adopted the civil law doctrine of charities. Roberts on Fraud, 353, in note 125, says: "By the civil, and more particularly by the canon law, certain preferences and indulgencies were allowed to the *testamenta ad pias causas*. But it does not appear that our law makes any distinction in favor of a will for the benefit of a charity. Thus if a devise be made to A. and his heirs, and if A. die without heirs, to a charity, such devise over is void, as it would be in case of common persons; and no favorable construction will take place to give effect to such devise over, such as would be made, if it were to a person related in blood, so as to be capable of becoming the heir at law, from an implication of intention, founded upon the impossibility that the first devisee should die without heirs, while the ulterior devisee was living, by restricting the sense of the word 'heirs' to heirs of the body." He cites Cró. Car. 57,¹ *Attorney-general v. Gill*.¹ This last case was an information by the attorney-general to establish a charity, and the lord chancellor said: "As to what is said, that the devise of the remainder ought to be supported as given to a charity, suppos-

1. *Hearn v. Allen*.

2. 2 P. Wms. 370.

ing it void if given to a common person, so shall it be also when given to a charity;" and adds, that "heirs" shall not be construed to mean heirs of the body, where the devise over is not inheritable, and quotes many authorities; thus making blood a greater favorite of the law than charity even.

The same note adds, "and on a deficiency of assets, legacies to a charity will abate in proportion of others," and cites two cases, 1 P. Wms., and adds, "but nevertheless, our courts of law or equity will not enjoin the spiritual court from proceeding in legatory matters according to the civil law: *Fielding v. Bound*, 1 Vern. 230." In *Masters v. Masters*, 1 P. Wms. 422, the master of the rolls says, "that the charities, though preferred by the civil law, ought to abate in proportion, for they were but legacies." In *Attorney-general v. Hudson*,¹ the lord chancellor said that all the legacies, as well to charities as others, should abate in proportion, for though the Roman law preferred a pious or charitable legacy to others, ours does not; and in a note it is said: "But the spiritual court give a preference to charity legacies, and Lord North would not enjoin them." This shows that there is yet a conflict of laws in the different courts as to charitable uses; and this single note is some evidence to my mind, that the general understanding of the profession there is, that the common law will not violate its own settled principles in favor of a charity which may not always be just; for what a charity gains, some one or more must lose; and it is not because our ancestors thought less of piety and charity, but because they respected more the certain and sure tenure of property and the tranquil succession of the offspring to that of their ancestors, that they guarded more against the caprice of testators.

Much creditable research and acumen have been shown in endeavoring to make out that the courts of chancery, by their common and ordinary jurisdiction, independent of the statute of Elizabeth and of the prerogative, have sustained defective, and at law, void bequests to charities, etc. Duke on Charitable Uses, with the readings of Sir Francis Moore upon the statute of charitable uses, which it is said to be suspected had escaped the attention of the supreme court of the United States and of Lord Loughborough, and which is so rare in America that its only fellow is in the library of some (I suppose inaccessible) antiquarian society, has been imported for the occasion. As great judges and chancellors have differed on this

1. 1 P. Wms. 674.

topic, it was a fit subject of forensic criticism, but to me it appears, that if there have been some few such decisions, they were made by confounding the civil and canon law, the previous statutes, and the prerogative together, with the superstitions of the times, and have become as obsolete as the book which contains them, and which, it seems, is not known at the capital and scarcely at Westminster Hall, and should now be regarded rather as buoys to deter than beacons to invite.

Many of the cases in Duke show that wretched work was made with charitable uses, some, if not all, under the statute. A few will be transcribed as a specimen. Page 386: "A wife having power to dispose of her personal estate, which only comprehended what she had before marriage, got afterwards into the possession of a large personal estate, in a private manner, upon the death of her father, and concealing the same from her husband, disposed thereof to charities. Held, that what was so concealed from the husband shall not be made good to him, so as to disappoint the charities." Page 390: "A devise to trustees for the benefit of a charity, the trustees died in the lifetime of the testator, though it be a lapsed legacy in law, it is subsisting in equity." Page 401: Lord Hardwicke says: "This is a different kind of charity from those pretended ones in the times of popery and monkery." Page 360: "An inscription on the donor's tombstone, declaring the donor's gift to a charitable use, was found in *hæc verba*, and a decree thereupon accordingly, and is a very good precedent." This inscription was the posthumous offspring by another father. Sir Francis Moore's readings, Duke, 128: "It was decided, that, in case of will by a popish recusant to students in divinity did not mean poor priests, for that was no charity, but superstition." Page 124: "Religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodoxy, may at another be accounted superstitious, and then such lands are confiscated. Therefore, a gift of lands to maintain a chaplain or minister, to celebrate divine service, is neither within the letter nor spirit of the statute of Elizabeth." Page 125: "To find bows and arrows for poor children of a poor man is good, because it is an ease to the fathers who are bound to find them." And to complete the list of unjust and ridiculous decisions, it was gravely adjudged.

It is said, though it is not in Duke, that where an Israelite left money to build a synagogue, that was superstitious; but as the Jew evidently had a charitable intent, the money should be

laid out to build a lying-in hospital. Shall we now assume the power that was there exercised, whether it was ordinary or extraordinary—whether it was the spirit of the statute of charitable uses, or the domination of the clergy, who had acquired much of the landed property of the kingdom, and the bishop being the orphans' court, denied their right to personal property, and gave it to strangers in charity at pleasure, until the statute of distributions, or any other cause which occasioned these odious decisions? I think not, so far as I know, until this case arose, no one in this state ever dreamed of such a chancery power.

As to the statute of Elizabeth being in force here, that has latterly, with great discussion, been abandoned in the argument. The forty-first section of the constitution of Vermont, has been urged as authorizing the court to extend the protection claimed to these societies. But the latter clause, which says, "under such regulation as the general assembly of this state shall direct," evidently gives this power to that body. They can enact a statute of charitable uses, in addition to what they have done for them. Granting the power to them, is not granting it to us; but is virtually saying, if it means this protection, that we have it not, and is in favor of the other side, who have also quoted it. If it means other protection and encouragement, it has nothing to do with this case. It is also contended that the statute of Elizabeth, or the spirit of it, has been introduced into most of the states: in some of the old states, it has been so considered, it seems.

The Pennsylvania case, reported in the pamphlet produced, in which Judge Baldwin displays so much learning, was decided on the ground that the Quaker societies "must be considered as a body politic or corporate by presumption—as possessing and enjoying the right of succession, with the same rights of property, as natural persons do by inheritance." That aided the cause. The balance of the opinion is what has been called sloping over.

In New York, Chancellor Kent says, it was unsettled when he wrote; notwithstanding Chancellor Jones' opinion, I do not understand that the glebe rights in Vermont are held upon any chancery or charitable use principle, but upon the common principles of grants—the fee to vest in the parson, when inducted like one. And the New Hampshire grants to the first settled minister, like a devise to the future children of A. But if it were so, the decision of the supreme court of the

United States, in which this state, by granting away these lands to common schools, had made itself a party, would hardly be adopted as the local common law. But after all, suppose it were granted that all the English courts of chancery have and do consider that the system of churches is established, and that by these ordinary powers, they can support bequests defective at law, is it applicable to our government and community? Is it called for by the wants of religion, virtue, or literature? For upon the question of making a precedent, and not following one already made, these are proper inquiries.

In England, for many centuries, bequests to corporations and to pious and charitable uses, by various acts of parliament and decisions of the courts, have been alternately encouraged and discouraged, as different notions prevailed, until the laws and usages had become very much involved: when, by the 9 George II., the final mortmain act was passed, which did not, like Henry VIII., seize upon the property of the church, or the charities; but effectually guarded against all death-bed importunities, as to worldly matters, and perhaps was intended among other things to remind opulent persons that deeds of charity, like the work of repentance, should not be put off to the last. This act has now existed for a hundred years, save one. Some part of it, at least, of enlightened jurisprudence and of vital piety, has been commended by many wise men, and condemned by none, so far as I know. And the present century, so far as Christian benevolence can be shown by not withholding the sinews of its warfare, has been a time of unparalleled generosity. For the Protestants of that realm have poured out their money for pious uses, as freely as the martyrs of old did their blood; and to their example we are probably indebted for much of the same spirit, which has been manifested in this country.

And shall we now introduce a system here, which has been exploded there without any apparent injury, and which probably has produced great benefits? I do not mean to intimate that a mortmain act is required in the state. Our early marriages, and the love of progeny, of which most men have sufficient, and the general prudence and discretion of ministers and other pious men, during last sicknesses, have prevented, and is sufficient to prevent the danger of improper influences. And on the other hand, the simplicity and ease of making valid bequests to charity, which is generally less difficult than disposing legally, as is intended, of an estate, among a large

family, requires no special indulgence for carelessness or mistakes. But let it remain as it has remained; and let him who deems it duty to leave his property to the public in lieu of his relatives, take the trouble to see that he does it according to law. For if he has well considered the subject, he has time and opportunity to do so. And if it is a sudden thought that suggests itself, or that is suggested to him at too late a period to do this, its propriety may be dubious, and let his property take the course of nature, which generally will do very well. But a strong objection in my mind against assuming the power, is the great difficulty in deciding what shall be a charitable use. In many cases like the present, there could be no doubt; but in others less clear, there would be many doubts. In the list collected by Judge Baldwin, in *Sarah Zane's case*, of statute and adjudged cases, to be valid [relied] on as pious and charitable, before the statute of 43 Elizabeth, are forty-six; and those embraced by the statute, twenty-one. These include various public matters that would not at this day and in this country be called pious or charitable, but rather strict legal duties, if any, as "cleaning the streets," "the maintenance of pier-walls and sea-banks," "maintaining the poor in houses of correction," "for repairing roads and bridges." "fitting out soldiers' and other taxes."

In applying these statutes or decisions, or the spirit of them, as we are urged to do, it would be necessary either to consider charitable uses to extend to every use that is not private, or it will devolve on the court to decide what objects should be considered as pious or charitable; for it is evident that the courts of England have not considered, like Domat, that "since legacies for works of piety and charity have a double favor, both that of their motive for holy and pious purposes, and that of their utility for the public good, they are considered as being privileged in the intentions of the law." For the public objects which I have quoted, stand upon the same footing as those that are public and pious, such as "the endowment of a vicar to inform the people;" and it would not be contended, it is supposed, that a bequest to a railroad or steamboat, would be to a pious or charitable use, so as to entitle it to more favor than a legacy to a child, or other relation. Of course the court of chancery here must, without the aid of the statute of Elizabeth, as to designating the objects, beyond the letter or spirit of which, the English chancellors, since its passage, have never extended their charitable construction, and to that extent, with

regret, decided what are objects of piety and charity, that ought to be favored and treated with more benignity in equity, than they are viewed in the austere courts of the law.

And Sir Francis Moore has said, that religion is variable according to the pleasure of succeeding princes. It might happen, that piety and charity, about the modes and forms of which good men disagree, would vary with succeeding chancellors, and with the excitement and fluctuations of the times and topics that engage the attention of the public. The difficulties are not the common ones which all courts have to encounter, of distinguishing cases, and applying some known rule or principle to the one in hand; or if the case is new, the best analogous principle, and which there is sometimes perplexity in doing, but can generally be effected with tolerable correctness; because most honest men are agreed, in the main, about what is just. But the difficulty in the cases in question is intrinsic; for all things that are lawful are not commendable; and what is commendable at one time, is not at another, from mere change of public sentiment. Only twenty years ago, a distiller was deemed a useful citizen; he promoted home manufactures, which tended to make us independent of other nations. Now he is a man-slayer, because he makes liquid poison. Yet the business is as lawful now as then; and upon a question of right, would be as well protected; but upon a question of favor, it would be otherwise. There has been no such change of opinion as to fraud, accidents, and trusts, always the proper subjects of chancery.

But suppose we were now to make a list of uses that are to be especially protected, and therefore encouraged as bequests to pious and charitable uses, or which may be the same test, suppose any or all the societies of this and the neighboring states should claim to have a defective bequest, supported under favor—to say nothing of masonic societies, as that question has become political—how would it be with colonization and anti-slavery societies, which regard themselves as the antipodes to each other? Are they both commendable? And if not, are we to say which, if either is? Or suppose an endowment of a free school for blacks in the state should, or should not be favored; or the establishment of a Shaking Quaker station, or to the Mormons, or to establish a Jesuit college, or a nunnery, or a synagogue: These are all lawful, and equally protected, with other religious and charitable societies, by the constitution and the laws, and would receive equal justice at our hands.

But in the matter of favor, as being pious and charitable uses, to say "no" to any of them, would be invidious—to say "yes" to them all, would be a tremendous stretch to the conscience of an orthodox chancellor. Nothing but the express warrant of the legislature would induce me to handle these exciting questions, some of which there is already danger may affect the tranquillity of the nation. And to assume or to use the undefined and undefinable judicial discretion, which has been urged upon us, will compel us or our successors to entertain these and other similar questions whenever they arise.

Finally, although I most cordially approve of the objects of all these societies, having been for a long time an unworthy member of some of them, or their branches, and happen to be of the same faith with the testator, and of the religious societies that he intended so liberally to patronize; yet I can not but believe, with due submission, that the cause should have been decided the other way.

CHARITABLE USES.—The subject is discussed at length in the note to *Dashiell v. Attorney-general*, 9 Am. Dec. 577. In the note to *Methodist Church v. Remington*, 28 Id. 68, the decisions upon this subject appearing in this series are collected. *Going v. Emery*, Id. 645 and note, also furnishes illustration of some of the principles involved in the doctrine respecting charitable uses.

DOW v. SMITH.

[7 VERMONT, 465.]

FOR TAKING PROPERTY EXEMPT FROM EXECUTION, trespass is the proper form of action against the sheriff in Vermont.

A TWO-YEAR OLD HEIFER, FORWARD WITH CALF, is within the statutory provision exempting a debtor's only cow from execution.

THE BENEFIT OF THIS EXEMPTION is not lost by the fact of the debtor's retaining in his possession a cow which he had previously sold, notwithstanding *bona fide* purchasers and attaching creditors might seize such cow as the property of the debtor.

TRESPASS for taking a heifer under execution, and selling the same. The defendant was a deputy sheriff. The heifer was a two-year old, and was forward with calf. In the plaintiff's possession at the time of the levy, was another lined-back cow, which he had previously sold to one Knights, to secure certain advances. Verdict and judgment for the plaintiff.

Swell, for the defendant.

Bell, *contra*.

By Court, COLLAMER, J. The first question in this case relates to the form of action; should it be trespass or case? It is insisted that the exemption of property from execution is like the exemption of the person from arrest; for a breach of which last privilege it has been holden that trespass will not be sustained.

For taking property, exempt from execution, trespass has ever been the form of action in this state, as the following cases will show: *Crocker v. Spencer*, 2 D. Chip. 68 [15 Am. Dec. 652]; *Leavitt v. Metcalf*, 2 Vt. 342 [19 Am. Dec. 718]; *Kilburn v. Demming*, 2 Id. 404 [21 Am. Dec. 543]; *Spooner v. Fletcher*, 3 Id. 133 [21 Am. Dec. 579]; *Fry v. Canfield*, 4 Id. 9; *Haskill v. Andros*, Id. 609 [24 Am. Dec. 605]; *Hart v. Hyde*, 5 Id. 328; *Leavitt v. Holbrook*, Id. 405. After so long and uniform a usage, sanctioned by the court and the profession, we should be slow to adopt a new course not necessary to the rights of the parties. Nor is this difference in the form of action as to an attachment of exempted property, and an arrest of a privileged person, without a distinction in principle. Exemption of a person from arrest is a mere personal privilege which may be insisted on or not, at the time, as the person is always present; and unless the person insists upon his privilege it is considered waived. The law of arrest therefore continues in force even as to such person. In relation to the attachment of property it does not depend on any such condition and could not, with propriety, as the owner is not presumed to be present to insist on the exemption. It is as if there was no law for such an attachment or levy.

The next question relates to this animal being called a cow, within the statute which exempts a man's last cow from execution. This exemption is charitable and in the cause of humanity, and ought to receive a liberal practical construction. The charge was that a heifer with calf where the owner had no other cow is within the exception. This only permits the poor man to call and consider this his cow when he has no other more clearly entitled to the appellation. This will involve no such practical difficulties as to uncertainty, where there are other cows, as have been suggested, in argument.

The next question is, had the plaintiff another cow? The lined-back cow had, by a bill of sale, absolute on the face of it, been sold to Knights. The consideration of that sale was the signing a note for the plaintiff, a part of which he had paid. This would render it a mortgage of the cow to Knights,

instead of an absolute sale; but still, as between the plaintiff and Knights it was the cow of Knights, who had the right of immediate possession: *Gifford v. Ford*, 5 Vt. 532. It is now insisted, that the sale, whether absolute or conditional between the parties, inasmuch as the cow was left in the plaintiff's possession, was void as to creditors, and so, as to them, the plaintiff was the owner of the lined-back cow. It is, however, not true that this sale is, properly speaking, void as to creditors; it is only voidable by creditors attaching or purchasing; and this must be by attaching the same property. In the case of *Spaulding v. Austin*, 2 Id. 555, it was decided that the non-delivery of part of the property sold only rendered the sale void as to creditors attaching that part, not as to other property, even in the same sale. The plaintiff must have been in fact owner of the other cow. If a man owns two cows and he sells one for six cents, and delivers possession of it fraudulently in fact to injure creditors, this is a good sale as against him. Now can he never after hold one cow exempt from execution, nor have this either on the ground that the sale was void as to creditors? Creditors can only say a sale is void as to them when they have treated it as void, and attached the same property. The cow thus sold is not the vendor's cow; it is the property of the vendee, subject to the attachment of creditors. It must be avoided by creditors attaching it, or it stands good to all purposes. This is the same whether it be fraudulent in law or in fact.

Judgment affirmed.

EXEMPTIONS FROM EXECUTION.—Statutes in respect to exemptions should be liberally construed: *Hall v. Penney*, 25 Am. Dec. 601 and note. In *Haskell v. Andros*, 4 Vt. 609; S. C., 24 Am. Dec. 645, it was determined under this statute that a person's only cow was exempt although he resided in Canada and the cow had casually strayed within the state. Butter made from the milk of a debtor's only cow was exempted from attachment and execution in *Leavitt v. Metcalf*, 19 Id. 718. In respect to the exemption of "tools" from execution, see *Batchelder v. Shapleigh*, 25 Id. 213, and *Kilburn v. Demming*, 21 Id. 545, in the note to which the cases are collected and examined.

TRESPASS LIES FOR SEIZING EXEMPT PROPERTY: *Hall v. Penney*, 25 Am. Dec. 601 and note.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

ALLEN'S EX'R v. HARLAN'S ADM'R.

[6 LEIGH, 42.]

DETINUE CAN NEVER LIE AGAINST ONE who was never in possession of the property sued for.

DETINUE AGAINST AN EXECUTOR for property destroyed or converted by his testator, or in the possession of a co executor, can not be sustained.

DETINUE FOR PROPERTY IN THE POSSESSION OF AN EXECUTOR, although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate.

AN ACTION OF DETINUE MAY BE REVIVED against the executor of the defendant on the death of the latter; but the *scire facias* must, in such case, suggest that the property has come to the possession of the executor. If this suggestion proves true, judgment will go against the executor personally for the property or its value, and *de bonis testatoris* for the damages from the date of the detention by the testator to the return of the verdict.

DETINUE by Harlan's administrator against Allen, for certain tools. The declaration charged a bailment. Allen pleaded *non detinet*; and, after issue joined, died. Plaintiff then prosecuted a *scire facias* against Allen's executor, requiring the latter to show cause why the action should not proceed to judgment. The *scire facias* did not state that any of the property had come to the possession of the executor. The executor appeared in response to the *scire facias*; but no pleadings were filed on either side other than those filed prior to Allen's death. A jury was impaneled to try the issue joined, and found that the defendant, viz., Allen's executor, detained the goods, and that their value was three hundred dollars, and that the damages arising from their detention were one hundred and thirty-five

dollars. Judgment was given in favor of plaintiff and against the defendant for the goods, of the value of three hundred dollars, if they could be had, but if not, then for the three hundred dollars, their value, with one hundred and thirty-five dollars damages, and costs of suit.

Allison, for the plaintiff in error.

Claiborne, for the defendant in error.

TUCKER, P. From the nature of the action of detinue, I think nothing can be more clear, than that it never can lie against a party who has never had the possession. Its object is to recover the identical property, which can not be had from him who has it not. Hence the decision, that it will not lie against the executor of a bailee who has destroyed or converted the chattel: Bull. N. P. 50; and that where there are three executors, one of whom only has the property in possession, it will lie against him only. In short, it is an action given in respect to the supposed possession of the defendant, and therefore will not lie where he has never had it. In every aspect, in which we can look at the action, this result is apparent. For, taking the doctrine of *Burnley v. Lambert*, 1 Wash. 308, as undeniable—that detinue will lie against a party who has once had the possession, though he parted with it before the emanation of the writ, because he can not deprive the owner of an action which he once had; yet this is because he may be distrained, by his goods and lands, until he regains the chattel and delivers it over in obedience to the exigency of the writ. Such a process may, indeed, be appropriate against one who, having once had the possession, has fraudulently eloiigned it before action brought; but it would be unreasonable that the lands and goods of the executor himself, who never had possession, should be distrained for the omission to surrender what he had not; and it would be most mischievous, if the whole estate of the testator in the hands of the executor, should be sequestered, to the prejudice of all the creditors, and without benefit to the plaintiff in detinue; since the issues and profits can not be appropriated to him, but must go to the commonwealth. But where the executor himself has the possession, the judgment is against him for the property, and the process of *distingas* properly issues against him, not against the testator's estate.

On the first suggestion of the question, I was somewhat doubtful, whether the action of detinue (in which the testator might have waged his law: 3 Bl. Com. 152, 345), would lie against

an executor upon the detention of his testator. It seems, however, unquestionable that it does; and the declaration charges the finding or bailment and detention by the testator, and the subsequent possession and detention by the executor; and this last, as we have seen, is altogether essential: See *Rast. Entries*, 210; 7 *Wentw.* 647, 648. But still it does not lie unless the executor has possession: 1 *Wms. Saund.* 216, note 1; *Bro. Abr.*, *Detinue*, 19; 8 *Vin. Abr.*, *Detinue*, D., pl. 1, 4; D. 5, pl. 19; B. 2, pl. 1.

If then the action lies against the executor, it is susceptible of being revived under our statute: 1 *Rev. Code*, c. 128, sec. 38. But it is obvious, that the *scire facias* to revive must set forth, by way of suggestion at least, the material allegation, that the property had come to the hands of the executor since the testator's death. For otherwise, it does not appear that the action would have lain against the executor; and of course, it does not appear that it was susceptible of being revived against him. Where that is charged, the executor may plead *non detinet*, and if found for him the action is barred; but if found against him, the judgment must be for the thing, or its alternative value, against him personally, and for damages from the date of the detention by the testator, to the time of the verdict, to be recovered *de bonis testatoris*. For though the profits since the testator's death have been received by the executor, yet by pursuing the original action, instead of commencing a new one against the executor for his detention alone, the plaintiff shows his election to consider him as taking the profits *qua* executor, and he must take his judgment accordingly. If, indeed, he prefers, I have no doubt he may sue the executor in *detinue*, and recover damages for his detention, out of his own proper goods; since it is his own fault that he has detained the property of another, and it is no justification for his doing so, that he found the property among his testator's effects, and held it only as executor. So too, if the property never came to the executor's hands, the owner is not without his remedy, but may have it either by action of *trover*, if it was converted by the testator, or by action for money had and received if he had received it.

Such, I apprehend, are the principles applicable to this matter. In this case, those principles are disregarded, and the errors are gross and palpable. There is but one issue, and that is upon the detention of the testator. To that issue the jury has not responded at all, but has found that the executor de-

tained; which it was not sworn to try, which was not in issue, and which indeed was not even charged anywhere in the pleadings. Upon this verdict, too, there is a judgment for the damages against the executor *de bonis propriis*, though it is fairly presumable, that a part of them accrued during his testator's life-time.

I am of opinion, that the judgment should be reversed, and the verdict, and all the proceedings up to the *scire facias*, set aside. That *scire facias*, being irregular and defective, may then either be quashed on the plaintiff's motion, and a new *scire facias* awarded; or he may file a declaration on the *scire facias*, containing the necessary suggestions; and if he fails to do either, this *scire facias* will be open to the demurrer of the defendant. And thus, in one or the other way, the case will be properly prepared for a final decision. The other judges concurred.

Judgment reversed, etc. ———

OBJECT OF SCIRE FACIAS against a personal representative: *Carter v. Carriger*, 24 Am. Dec. 585.

AN ADMINISTRATOR IS LIABLE PERSONALLY, in trover, for the sale by him of chattels of another, as part of his intestate's estate, though he was ignorant of the rights of the true owner, and though he apply the proceeds of the sale to the discharge of the debts of his intestate: *Newsum v. Newsum*, 19 Id. 738

MOORE'S ADM'RS v. FITZ RANDOLPH ET AL.

[6 LEIGH, 175.]

SPECIFIC PERFORMANCE WILL BE DECREED AGAINST AN HEIR AT LAW on a contract of sale made by his ancestor, though such contract did not purport to be obligatory on the heirs.

MUTUALITY OF CONTRACT is a prerequisite to a decree for specific performance. It is sufficient that this mutuality exist when the contract is made; subsequent events destroying this mutuality do not render the contract inoperative.

AFTER RECOVERY BY A VENDEE FOR A BREACH OF A COVENANT TO CONVEY, against the administrators of a deceased vendor, it is too late for the latter to maintain a bill against such vendee and the heirs of the vendor for specific performance.

BILL for specific performance. Moore, in his life-time, sold certain lands to Fitz Randolph for seventy dollars in cash, and two hundred and eighty dollars, payable in four equal annual installments, and bound himself upon full payment to make a good and sufficient title in fee simple. Fitz Randolph went

into possession, and thereafter made payment in full, partly to Moore, and partly to Moore's administrators. Fitz Randolph then brought an action against the administrators for breach of the covenant to convey, and obtained a verdict and judgment for the amount of the purchase money and interest. Thereafter the administrators commenced this suit, making all the heirs of Moore parties defendant with Fitz Randolph, and praying that the heirs be required to make and Fitz Randolph to accept a proper conveyance, and that he be enjoined from executing his judgment at law. An injunction was granted on the bill, but the chancellor finally determined that the covenant of Moore to make a conveyance was personal, and did not bind his heirs, and that Fitz Randolph was under no obligation to accept a conveyance from such heirs, but might waive the contract, and recover the purchase money at law as he had done. The injunction was dissolved, and the administrators appealed. The action of the chancellor was by him believed to be in harmony with *Spindle's Adm'rs v. Miller's Ex'rs*, 6 Munf. 170.

Leigh, for the appellants.

Johnson, for the appellee.

CARR, J. It was strenuously urged by the appellants' counsel, that we can not sustain this decree, without establishing it as a general doctrine, that the power of equity to decree a specific performance of an agreement for the sale of real estate, at the instance of the vendor, must in all cases depend on the life of the vendor; and the conclusion was reached thus: If you say, that where the vendor dies before conveyance, his heirs can not compel the vendee to a specific performance, because they can be called on for a deed with special warranty only, while their ancestor was bound for a general warranty, you must go on and say, that neither can the vendee compel the heirs of the vendor to a specific performance, because it is a settled rule of equity, that in all such cases, the remedy must be mutual; and thus you come to the doctrine, that the contract of the ancestor does not bind the heir, to whom the land descends. For myself, I must say, that I can come to no such doctrine; for the cases clearly show, that if a man owning land contract for the sale of it, and die before a conveyance executed, his heir at law will be decreed to perform the agreement *in specie*, even though not named in the covenant. The cases cited by Sugden (p. 145) fully support this. Thus in *Gell v. Vermedun*, 2 Freem. 199, the defendant's ancestor, to whom

he was heir, articulated in his life-time, for the sale of certain lands, which by the articles he covenanted to convey, but did not covenant for him and his heirs; and the question was, whether the heir should be bound to perform this agreement? And held, that he should, inasmuch as his ancestor, after the sealing of the articles, was in the nature of a trustee for the plaintiff of those lands, which trust with the lands descended to the heir; and decreed accordingly: citing the case of *Stevens v. Baily*, Nels. 106, where tenant *pur auler vie* to him and his heirs, articulated for a sale, and died; although this is such an estate as is not assets for the heir, yet he was here decreed to execute this agreement. Other cases are cited in the notes to this case, by the editor. I agree also, that a contract must be mutual, otherwise equity will not execute it; that is, both parties must by the agreement have a right to compel a specific performance, according to the advantage which it might be supposed they were to derive from it.

Bromley v. Jeffries, 2 Vern. 415; *Armiger v. Clark*, Bunb. 111; *Lawrenson v. Buller*, 1 Sch. & Lef. 13, are cases of refusal to execute contracts for want of mutuality. But if there be a mutuality of remedy at the time of the contract being entered into, that is sufficient; for, in such a case, it will be no objection to decreeing a specific performance, in favor of the plaintiff, that by a subsequent contingent event, it could not be enforced against him: See Lord Hardwicke's opinion in *Stapilton v. Stapilton*, 1 Atk. 10. Thus, in the case before us, if by the contingent event of the death of Moore, before making the conveyance, it should be considered, that the specific execution could not be enforced against his vendee, because he could not get the title he contracted for, it would not follow, that the vendee could not enforce such specific execution against the heirs of the vendor; for we know, that if A. has contracted to sell B. land, and to make him a perfect title, he must be able to show such title, or he can not enforce a specific execution; while, in the same case, B. may enforce a specific execution against A. if he is willing to take his defective title. I state this to show, that the rule of mutuality does not apply to such cases as these.

Let it not be supposed from these remarks, that I mean to decide the question, whether a specific execution of a contract for land, can or can not be enforced against the vendee, where the vendor is dead. I mean to give no opinion on the point; but have said thus much to show, that while I did not dissent

from the general positions taken by the counsel for the appellants, I could not agree with his conclusions in all their latitude. I shall now state the particular and special grounds (not touching these general doctrines) on which I think the injunction was properly dissolved.

When the vendee had completed his payments, he had a clear right to demand his title. The bill tells us, that the administrators offered to procure a deed with special warranty from all the surviving children of the vendor, but he refused this, unless the title of the vendor's infant grandchildren was also obtained. If upon this refusal, the administrators had at once filed their bill, claiming the purchase money as their fund, making the vendee, and all the vendor's heirs, parties defendants, and praying a specific execution; the question would have been fairly raised, whether this was a proper case for such decree; and the court of equity, having possession of the subject, would, until it was disposed of, have prevented the vendee from suing on his covenant, on the ground, that in a case proper for the action of both courts, that which first gets it, will hold it. But instead of this, the administrators contented themselves with the offer they had made.

The vendee then had to choose his own path: he might sue in equity for a title, or at law for damages: he chose the latter; and proving to the satisfaction of the law tribunal, that the covenant of the vendor was broken, he recovered his purchase money with interest. And now, for the first time, the administrators think of filing their bill, and bringing the subject into equity. I think they have come too late. We can not in the teeth of the judgment at law, deny that the covenant was broken; nor can we dispute the plaintiff's right, if not first called into equity, of suing at law for damages. The ground on which equity first assumed the power of giving specific performance of contracts, was (we are told) to aid the defective remedy of the common law. A man bought a tract of land; it pleased his taste, and he wanted it for a residence; after he had paid his money, the vendor changed his mind, refused a title, and the vendee could only sue at law for the money he had paid: equity said, this is not justice: if the vendee wants the land, he shall have it *in specie*. Having gone thus far—the courts, on the ground of reciprocity, went a step further, and said, that the vendor also should have their aid, if the vendee refused to execute the contract. But they did not say, and could not say, that a vendor might break his covenant, suffer a suit on it at

law, take his chance of defense there, and when judgment was recovered against him, begin a new race in equity for a specific execution. In *Long v. Colston*,¹ Long, considering that Colston had broken his covenant, sued on it at law. Instead of defending himself there, Colston filed a bill offering a specific execution, and praying that the whole matter might be transferred into equity. The chancellor entertained his bill, enjoined the proceeding at law, and finally gave him the relief he asked, on the broad ground, as Judge Roane states, that in cases proper for specific execution, though the party grieved may have elected to proceed at law for damages, yet as he might have resorted to equity for a specific performance, and as in equity remedies ought to be reciprocal, the aggrieving party may compel him to abandon his common law remedy, and hold him down to a remedy for specific performance. This court reversed the decree, dissolved the injunction, and dismissed the bill without prejudice.

In the course of a very strong argument, Judge Roane laid down this position (in which the other judges seemed to concur), "that after a breach, a plaintiff may elect to proceed at law, for reparation in damages, and that he can not thereafter be compelled to go for the thing *in specie*, unless he wants it, or unless some particular grounds of equity exist, on behalf of the party breaking the contract, excusing and relieving against such breach, and showing that, according to the principles of equity, the contract ought nevertheless to be performed *in specie*." I can see no particular grounds of equity in this case, rendering it unconscientious in the vendee to hold the judgment he has recovered, nor oppressive to the other side, to refund the money, and keep the land; nothing rendering a specified execution more consonant to the principles of equity in this case, than any other contract for land. As to the point, that Fitz Randolph retains possession of the land, and has received the profits, it will be with the court below, when the cause goes back, to do what is right in that matter: this is an appeal from an interlocutory order, merely dissolving the injunction.

BROCKENBROUGH and CABELL, JJ., concurred. Decree affirmed.

Absent, TUCKER, P., and BROOKE, J.

MUTUALITY OF CONTRACT is prerequisite to the aid of a court of equity to compel a specific performance: *Anderson v. Green*, 23 Am. Dec. 423, note; *Benedict v. Lynch*, 7 Id. 584 and note.

KERNEY'S ADM'R v. KERNEY'S HEIRS.

[8 LEIGH, 478.]

A LOST BOND MAY IN EQUITY be set up to charge either a surety or an heir of the obligor.

BILL in equity by the administrator of James Kerney against the children and heirs of Edward Kerney. It appeared that Edward Kerney as principal, and James Kerney as surety, executed four bonds, each for three hundred and forty-seven dollars, to Samuel Swearingen, payable April 1, 1804, 1805, 1806, and 1807. The principal died about the time the first bond became due, and before anything had been paid on either bond. The first bond was paid by James, the surety, without suit. Swearingen having in the mean time lost the last three bonds, filed in 1807, his bill against James Kerney, the surviving obligor and surety, stating the consideration, execution, and loss of the bonds, and praying for a decree against James for the amount of the lost bonds and interest. He obtained the relief sought, and James paid the debt, and then died. James' administrator filed this bill in October, 1822, alleging that the bonds executed to Swearingen bound the heirs of the obligors; that Edward Kerney, on whose estate no administration had been taken out, left real property which had descended to his heirs; and prayed that he, as administrator, be subrogated to the rights of Swearingen, and that the amount of the bonds, with interest, be charged on the lands of Edward Kerney which had descended to his heirs. Edward Kerney's heirs pleaded: 1. The statute of limitations; 2. That their ancestor left personal estate which ought to be applied to paying the debt, and that this personalty had been taken by the widow, who ought therefore to be made a party to this suit; 3. They called for proof that the lost bonds were binding on the heirs of the obligor. The evidence in the case showed that the bonds purported to bind the obligor's heirs; and that Edward Kerney died seised of real property which descended to his heirs; and that his personal estate was of nominal value. In November, 1828, Chancellor Browne, acting for Chancellor Tucker, decided that lost bonds could not be set up in equity against a surety, and therefore that James Kerney ought not to have acquiesced in the decree against him and in favor of Swearingen. He gave a decree for the amount of the first bond only. Complainant appealed.

Nicholas and Johnson, for the appellant.

Leigh, for the appellees.

CARR, J. The counsel for the appellees, in the argument here, abandoned both the grounds on which the interlocutory decree was founded; and very properly; for nothing can be better settled, than that equity will set up a lost bond against sureties, nor any point clearer, than that Swearingen was a competent witness. His debt was paid off, under a decree of twenty years' standing, and which never could be impeached. The counsel, however, questioned whether equity could charge the heirs of an obligor, upon a lost bond, and said that his research had not enabled him to find a single case in which equity had set up a lost bond against heirs. Believing that I should hardly find what had escaped the eye of that vigilant counsel, I have not looked for such a case. But taking up the question upon principle, I can not feel a doubt, that equity has the power, and that it is the duty of her courts to charge the heir upon a lost bond, wherever there is proof that it bound the heirs, and assets have descended. The right of the ancestor to bind the heir, so far as real assets shall descend, is one of the oldest principles of the common law. The proof in this record satisfies my mind, that the lost bonds did bind the heirs. What is the meaning of the phrase that equity will set up a lost bond, or other instrument? I understand it to mean, that the instrument will be restored to its pristine vigor and power; that the accident will be relieved against; the loss supplied. If so, and if the bond bound the heirs before the loss, it must equally bind them after it is set up—after it is found again; otherwise, it is not the same bond. In *Field v. Harrison*, 2 Wash. 140,¹ President Pendleton said: "It is true a court of equity will set up a lost bond against a surety; but the reason is, that the surety is not discharged by the loss of the bond, and the court only relieves against the accident, by setting up the evidence of the debt." Surely, this reasoning applies equally to the heir: he is not discharged by the loss of the bond; and when the evidence of the debt is set up, it is equally conclusive upon him, as on the surety. Indeed, the equity of the surety seems to me much the strongest; for he is bound, though he never received a cent; while the heir is only bound, when, and so far as he has received real assets from the original debtor.

The case of *Bishop v. Church*, 2 Ves. sen. 378, is not *ad idem*

1. *Harrison v. Field*.

with the present case, but I think the principle the same. That was the case of a joint bond, where one obligor died, and the application to equity was, to set up the remedy, confessedly gone at law, against the executor and heir of the deceased obligor: it was objected, in the argument, that when the heir was once clear at law, equity never bound him; but Lord Hardwicke said: "As to the heir at law, I am of opinion, that the plaintiff has the same equity against him. In all the cases, where two, their heirs, executors, and administrators, are bound in a joint bond, and by the death of one, in the life of the other, the legal lien and action at law have been gone, if a court of equity has allowed the equity, and set up the bond, it has always set it up, not partly only against the personal estate and executor, but against the heir also; because that is a very different case from that which was put, where the heir was not named." And he referred to several cases, and among others to *Action v. Pierce*, 2 Vern. 480, where A. gave a bond to B., his intended wife, which being extinguished by the marriage, was, after the death of her husband, set up against his heir.

I am of opinion, that the decree should be reversed, and the cause remanded, with directions to the court below, to enter a decree precisely like the final decree of the chancellor, except that it shall embrace the whole sum paid by the surety.

The other judges concurring, decree reversed, and cause remanded, etc.

Absent, TUCKER, P.

LOST PROPERTY.—A plaintiff is entitled to recover at law, upon a lost promissory note, where it was not negotiable, or where, though negotiable, it appears not to have been negotiated: *Chaudron v. Hunt*, 20 Am. Dec. 60. But in *Edwards v. McKee*, 13 Id. 474, it was held that no action at law could be sustained upon a lost bond or note. From the note to that case, it appears that there is conflict of authority as to whether or not relief with references to such instruments should not be sought exclusively in equity.

Where an article is lost, possession by the finder is sufficient to entitle him to maintain trover against any one who converts it except the owner: *Brandon v. Huntsville Bank*, 18 Am. Dec. 48. The finder of a chose in action can not maintain any action thereon; so held in the case of a finder of a lottery ticket purporting to be payable to the holder: *McLaughlin v. Waite*, 21 Id. 232; and payment to the finder will not protect the obligor in an action against him by the true owner, if he knew that the person to whom he paid was not the owner: Id. If a reward has been offered for the return of lost property, the finder becomes entitled thereto upon such return: *Deslondes v. Wilson*, 25 Id. 187 and note. In case part of the property is found and returned, the reward is ratably apportioned: *Deslondes v. Wilson*, *supra*; *Symmes v. Frazer*, 4 Id. 142.

As to when, if ever, the finder of lost property can be guilty of larceny thereof, etc., see *State v. Roper*, 24 Am. Dec. 268; *Tyler v. People*, 12 Id. 176; *People v. Anderson*, 7 Id. 462 and

COLLINS ET AL. v. JONES.

[6 LEIGH, 530.]

RELIEF IN EQUITY AGAINST A JUDGMENT will not be granted where the complainant is not shown to have exercised proper diligence in making his defense at law.

WHERE COMPLAINANT'S WANT OF EQUITY APPEARS ON THE FACE of the bill, no relief will be granted though the defendant answers instead of demurring.

BILL for relief against a judgment. The opinion sufficiently states the facts.

Smith, for the appellants.

Summers, for the appellee.

By Court, BROOKENBROUGH, J. The ground alleged for relief in equity against the judgment rendered for the appellants against the appellee, is of a purely legal character. The appellee alleges in his bill, that whilst the note on which the action was brought was in the hands of Collins, one of the assignees, he delivered to him thirty cords of wood, and sixty-two and a half cords to Johnson, by the direction and to the orders of Collins, in discharge of the note, and which at the price of a dollar and a half per cord, would have entirely discharged the note. He gives no reason why he did not prove these facts in the trial at law. He only alleges, that the reason why no credit was given to him for these payments or discounts, was that his principal witness, by whom he could have proved them, was absent on the trial at law. He does not allege, that he was taken by surprise at the trial, or that there was any fraud practiced on him; nor does he give any excuse why he did not defend himself at law, or assign any reason which can give jurisdiction to a court of equity. He does not even say why his material witness was absent. Did he use due diligence in summoning that witness to appear at the court? If he did, why did he not apply for a continuance of the cause? If he did apply for it, and he was overruled, why did he not except to the opinion of the court, and apply to the appellate tribunal, on the law side, for redress? Unless we are to disregard the uniform decisions of this court, from *Terrell v. Dick*, 1 Call, 546, to this day, we must say, that this bill presents no case for the interference of the court of equity, and that the injunction should not have been awarded. This was the original error in the case, which contaminates the whole of the subsequent proceedings.

It has, however, been urged in the argument of the cause, that the objection to the jurisdiction of a court of equity comes too late. The chancellor directed an issue; and it is said, that the defendants made no objection to the ordering of that issue, and that after that issue has been tried, and a verdict found against the defendants, they ought not now to be heard in opposition to the jurisdiction. A small degree of attention to the record will show, that the defendants objected to the jurisdiction at the very earliest period. The defendant Williams, after declaring in his answer, his ignorance of the payments alleged to have been made to Collins, calling for proof of them, and requiring that Collins should be made a party defendant, demurred to the bill, on the ground that it made no case proper for relief in equity, inasmuch as the court of law would have granted the plaintiff a new trial if he were really taken by surprise, or a continuance if he was entitled to one, or if either was improperly refused, the error might have been corrected by an exception, and a resort to the appellate court. The other defendant Collins also demurred to the jurisdiction on similar grounds, at the same time that he denied by his answer that the plaintiff was entitled to the credits. Mitford says, that if a bill does not show a sufficient ground for a court of equity to interfere, the defendant may demur for want of matter of equity in the plaintiff's case to support the jurisdiction of the court. It is not objected to the demurrers of the defendants, that they are informal, nor ought the objection to prevail if it were made. An informal demurrer, or an objection to the jurisdiction blended with the answer, is sufficient to give notice to the plaintiff, and to guard the court against the exercise of an improper jurisdiction: indeed, when it plainly appears on the face of the bill, that there is no case for a court of equity, the court will not grant relief on the hearing, though the defendant files his answer, and does not demur: *Pollard v. Patterson*, 3 Hen. & M. 67. The case now before us is very different from the case of *Van Lew v. Bohannon*, 4 Rand. 537. There, the defendant did not insist on the objection to the jurisdiction, but voluntarily went into the merits of the case, and in his answer admitted facts, which, if they had appeared to the court of law, would have produced there a different result. Here, both of the defendants insisted on the objection to the jurisdiction, and moved for a dissolution of the injunction as soon as their answers were filed; and they were forced into a trial of the merits against their will, by the court awarding an issue to

try the legal defense over again. This was the second error of the court. The injunction should have been dissolved on the bill and answers.

It is unnecessary to inquire, whether there was any error in the subsequent proceedings, or whether the court should have directed a new trial of the issue. The decree should be reversed with costs for the errors which have been noticed, the injunction dissolved, and the bill dismissed.

If any injury is done to Jones by refusing to take jurisdiction of his case, he has brought it on himself. After his neglect in making the proper defense before the court of law, he might have had his legal remedy against Collins for the wood sold and delivered to him or his order. Indeed, he has still that remedy; and if the lapse of time will enable Collins to defeat him in the pursuit of that remedy, he must see that his loss is the consequence of his own improvident course.

Decree reversed, and bill dismissed.

Absent, CABELL and CARR, JJ.

RELIEF IN EQUITY will not be granted, where its necessity has arisen from mere failure of one impleaded at law, to have there made proper defense: *Nevitt v. Gillespie*, 26 Am. Dec. 696; *Kearney v. Smith*, 24 Id. 550; *Armstrong v. Cheshire*, Id. 273; *McClure v. Miller*, 21 Id. 522; *More v. Bagley*, 12 Id. 144; *Gatlin v. Kilpatrick*, 6 Id. 557; *Cowan v. Price*, 4 Id. 627.

A BILL MAY BE DISMISSED UPON MOTION even after an answer has been put in, if upon the face of the bill it appears that there is a want of equity: *Coleman v. Coleman*, 28 Am. Dec. 86.

STEELE v. BOYD.

[6 LEIGH, 547.]

REMEDY BY MOTION may now be obtained where formerly the party would have been entitled to an *audita querela*. *Per Brockenbrough, J.*

PROCESS MAY BE QUASHED ON MOTION if irregularly or fraudulently executed. *Per Brockenbrough, J.*

SURETY ON FORTHCOMING BOND IS RELEASED if the creditor makes an agreement with the principal debtor to give the latter time, and to take a specified sum payable in annual installments in satisfaction of the bond.

RELIEF UPON THE MOTION OF A SURETY ON A FORTHCOMING BOND may be granted in a proper case in the court in which the bond was taken. That court may direct an *exoneretur* of the surety, and need not require him to seek his remedy by *audita querela* nor by bill in chancery.

THE PRINCIPAL IS A COMPETENT WITNESS FOR THE SURETY to prove an agreement by which the liability of the latter is discharged.

DAVID STEELE, as principal, and Samuel Steele and Joseph Seig, sureties, executed a forthcoming and delivery bond, for certain

property levied on by the sheriff under a *fiery facias* issued upon a judgment of the county court in favor of Elizabeth Boyd and against David Steele, and Samuel Steele, his appearance bail. In November, 1824, the forthcoming bond was forfeited and execution thereon was awarded against the obligors, and being issued, was levied on the property of the principal, who procured an injunction staying its execution till further order of the court of chancery. In June, 1825, Steele dismissed the proceeding for an injunction, in pursuance of an agreement between himself and Mrs. Boyd, to which his sureties were not parties, by which she stipulated that she would take, in full satisfaction, two hundred and fifty dollars payable in annual installments of fifty dollars each. Steele, at different times, paid nearly all of the two hundred and fifty dollars, but Mrs. Boyd applied the money to other debts due from him to her. Thereafter, in 1831, Mrs. Boyd took out another *fiery facias* on the forthcoming bond and levied it on the property of Samuel Steele, one of the sureties, who thereupon moved the court to discharge the levy, and exonerate him from all further process for the enforcement of the bond. He relied upon the foregoing facts, part of which he proved by his principal David Steele, to whose competency objection was taken and overruled.

The county court granted the motion. The superior court of Augusta, allowed a *supersedeas* to the order of the county court, and, upon hearing, reversed it on the ground that the remedy of the surety was in chancery, and that the testimony was not competent. Steele then obtained, from this court, a *supersedeas* to the judgment of the superior court.

B. G. Baldwin, for the plaintiff in error.

Peyton and Baxter, for the defendant in error.

BROCKENBROUGH, J. I shall make a few remarks on the question, whether in this case the plaintiff, Samuel Steele, had a right to resort to the summary remedy of a motion to discharge the levy of the execution on his property, and to enter an *exoneretur* from the process of execution, instead of being driven to the ancient remedy of *audita querela*, or to a bill in equity for an injunction. In the case before the general court, of *Smock v. Dade*, 5 Rand. 639 [16 Am. Dec. 780], this very question was ably and elaborately discussed by Mr. Johnson, in favor of the remedy by motion, and by Mr. Stanard on the other side. That court decided, that "as well from the uniform practice in Virginia, as from the modern decisions in

England, the more summary and less expensive mode of proceeding by motion was proper, and that relief may be given in this way, in all cases where by the ancient practice the party would be entitled to an *audita querela*." To obviate the objection which was urged, that this summary remedy can not be resorted to, where the question depends on contested matters of fact, that court further decided, that, on such motion, "the court may in its discretion cause them to be submitted to a jury, and that such cause is particularly proper, where the evidence is contradictory, or where it may authorize conflicting inferences, and either of the parties is desirous of referring the facts to that forum." I do not refer to that decision as an authority in this court; but as I concurred in it, and still think it a correct and valuable decision, I may be excused, I hope, from not readily departing from it. Blackstone (3 Com. 406) says, that "the indulgence now shown by the courts in granting a summary relief upon motion, in cases of evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice." If this was true in England, when he wrote, how much more true is it in this country? I question whether the oldest practitioner in our courts has ever known an instance of a resort to the *audita querela*, or whether the writ can be found in any of our records. The opinion of Blackstone is fully supported by the remark of Chief Justice Eyre, in *Lister v. Mundell*, 1 Bos. & Pul. 428; who says, it is "the modern practice to interpose in a summary way in all cases where the party would be entitled to relief on an *audita querela*."

The circuit court, whose judgment we are now examining, supposed that the injunction was the proper remedy. I do not deny, that that remedy might be resorted to, and in cases where a discovery from the defendant on oath is important, it may be the best remedy; but to make it the only remedy, would disrobe the courts of law of a most beneficial part of their power. "Every court," said Judge Lyons, in *Hendricks v. Dundass*, 1 Wash. 54, "hath a perfect right to watch over the execution of its judgments; and where its process hath been irregularly or fraudulently executed, to quash it, as being the best and speediest mode of doing justice." How could the former district courts, or the late circuit courts of law, have exercised this salutary jurisdiction, if a party against whom an execution has irregularly issued was compelled to resort to the court of chancery for redress? The *audita querela* being ob-

solely, unless the motion was allowed, the courts of law could give no redress in such cases.

But this question is, I think, settled by the decision of this court in *Bullitt's Ex'rs v. Winstons*, 1 Munf. 269. In that case, two executions had issued against the property of Littlepage and the Winstons as his sureties, in January, 1800, returnable the first of April following. The plaintiff Harrison, one of the executors of Bullitt, on the twelfth of March, directed the sheriff to put off the sale of the property until August, holding it subject to the executions, and to suffer it to remain in the possession of Littlepage, or his sureties. A subsequent execution was issued against the goods of the same parties in February, 1804. The sureties made a motion to the next district court, to quash the writ, on the ground that the time extended to the principal debtor, and the order to the sheriff, being given without any agreement on the part of the sureties, operated as a release to them. The district court sustained the motion, and quashed the execution. The judgment was affirmed by the unanimous opinion of this court. It may be remarked, that neither of the counsel for the appellants there (Botts and E. Randolph) took an exception to that mode of proceeding, nor did either of the judges notice such an objection. If it had not been the settled practice of the courts of law to hear such motions, there can be no doubt, that those able counsel would have made the objection. I think the question ought to be put at rest.

As to the question of the competency of David Steele, I shall only say that I concur with my brethren in the opinion, that he is competent.

On the merits, the case is clearly in favor of the appellant. I am of opinion, that the judgment of the circuit superior court should be reversed, and that of the county court affirmed.

BROOKE, J., concurred.

TUCKER, P. The first question in this case, refers itself to the power of a court of law to relieve the surety in a forthcoming bond, who has been absolved by the conduct of the creditor, in giving indulgence to the principal debtor, without the concurrence of the surety. The doctrine as to this matter, was first introduced into the courts of equity, and grew out of the principles of that court, which authorize the surety by bill *quia timet* to call upon the creditor to proceed against the principal: 7 Taunt. 126.¹ To that court the jurisdiction has been hitherto

1. *Melville v. Glendinning*.

mainly and wisely confined; and notwithstanding the exceptions, to which I shall presently advert, it seems to be well understood, that, as a general principle, the equity of the surety can only be asserted in a court of chancery. It would, indeed, introduce confusion and a total upturning of the established principles of the law, if such matter could be pleaded in discharge of a bond in a court of law; for an obligation under seal can only be discharged by force of an instrument of equal validity, or by payment and satisfaction. Hence, it has been solemnly decided, that it is not any defense at law to an action on a bond against a surety, that by parol agreement time has been given to the principal: *Davey v. Prendergrass*, 5 Barn. & Ald. 187; 7 Eng. Com. L. 62. To this decision I altogether defer; as I think it would lead to much embarrassment, if the barrier between the two jurisdictions, in regard to this matter, was broken down. It is unnecessary to go into an exposition of these embarrassments here. Suffice it to say, that prudence requires that the boundaries of the two jurisdictions must not be obliterated. But though the courts, both in England and in this country, have deemed this subject a matter peculiarly proper for equitable jurisdiction, yet the principle of relief to the surety, where indulgence has been given by the creditor, has long since been recognized and acted upon in courts of law, in reference to bail. The cases in which they have been relieved are numerous and uniform: *Croft v. Johnson*, 5 Taunt. 319; *Brickwood v. Annis*, Id. 614; *Gernon v. R. E. Assurance*, 6 Id. 383; *Willison v. Whitaker*, 7 Id. 53; *Thomas v. Young*, 15 East, 617; *English v. Darley*, 2 Bos. & Pul. 61; *Clark v. Devlin*, 3 Id. 366.

It is now the settled practice to enter an *exoneretur* of the bail, where it is shown that the plaintiff has taken a *cognovit* from the principal, payable by installments, or has made other arrangements with him, which tie up his hands from proceeding against the principal. But this is done upon the principle, that the recognizance of bail, and the proceedings thereupon by *scire facias*, constitute part of the process of the court in the original action, and are thus completely, and indeed necessarily, under the control and jurisdiction of the court. "The jurisdiction is founded upon a general authority in the court to see that an improper use is not made of its own records." "If it sees, that an improper use is attempted to be made of the security which the party has given (in the course of the process), it immediately interferes:" 5 Barn. & Ald. 187;¹ 2 Leigh, 363,

1. *Davey v. Prendergrass*.

369.¹ But where the proceeding is independent, and forms no part of the pending action, the jurisdiction is not entertained. Thus, though the relief is given to the bail in recognizance against whom the party proceeds by *scire facias*, yet in an action of debt upon the recognizance, the matter can not be pleaded in bar: *Bulleel v. Jarrold*, 8 Price, 467; S. C., 3 Eng. Exch. 422. And the reason seems to be clear; for though, where the court has possession of the cause, it must act upon it through all its ramifications, yet where a separate and independent process is instituted, there is no necessity or pretext upon which it can assume an equitable jurisdiction. Such being the well-settled doctrine as to bail, it is not perceived, why it should not embrace the case of a surety in a forthcoming bond. That bond grows out of the proceedings in the cause, not less than the bail bond: it is a part of the process in the cause; it is not a distinct, separate, substantive contract, but it is dependent upon, and intimately connected with, the action itself; it is a branch of that action, and forms an integral part of it; it follows the fate of it, and as its existence grew out of it, so it falls to the ground when it falls. If the original judgment is reversed, the forthcoming bond becomes naught: if the original judgment be superseded, a *supersedeas* to a judgment on the bond is matter of course: if judgment be confessed on the bond, it operates a release of errors in the original judgment: if the execution on which it is taken is quashed, the bond is quashed also: if it be returned and filed, it has the force of a judgment, and execution may be awarded upon it, on a summary motion, instead of a regular action: and lastly, if the bond is irregularly taken, it may be quashed upon motion of either party.

It is, indeed, not possible to conceive of a union more intimate and entire, than that which subsists between the forthcoming bond and the action in which it is taken; and every argument in favor of the exercise of jurisdiction in behalf of bail, applies with full force, I think, to the case of the surety in a forthcoming bond. In both cases, the court has possession of the cause, and in both, ought to exercise a like jurisdiction over all its ramifications. This jurisdiction is exercised by motion, or rule; and instances are not wanting in the practice of our courts, of this mode of proceeding. Thus, if the surety in the bond has paid or otherwise discharged the debt; if he has been excused from delivery of the property by the operation of an

injunction or *superædeas*: *Wilson v. Stevenson's Adm'r*, 2 Call, 213; *Rucker v. Harrison*, 6 Mulf. 181; or if the principal's property is taken and released: *Bullitt's Ex'rs v. Winstons*, 1 Id. 209; the surety may have relief by motion, upon which the whole matter is gone into (as was done in the case last cited) and decided by the court, with or without the intervention of a jury, at its discretion. I am, therefore, of opinion with the county court upon the question of jurisdiction. As to David Steele's competency: I think he was a competent witness. The motion was for an *exoneretur* only as to the surety. The judgment could not, therefore, be for an *exoneretur* as to him. And, indeed, his testimony, though it amply proves an arrangement which exonerated the surety, by no means proves a satisfaction of the judgment which discharged himself. Unless, therefore, the idea of the counsel be correct, that the discharge of the surety would operate the discharge of the principal also, there can be no foundation for the opinion, that David Steele was interested in giving the testimony which went to exonerate Samuel.

But it is not conceived to be true, that the *exoneretur* of one party, judicially pronounced, is a necessary release of all others, upon the principle that a release to one inures to all; for if this were so, then in all cases where the surety is discharged by the creditor's conduct, the principal would be discharged also, which can not be pretended. Where, as in case of a forthcoming bond, which is always joint and several, one party is absolved by any other means than what the law deems a release, the right to recover is not impaired as to the rest. And, in this case, nothing I think can be more clear, than that an execution may issue on the forthcoming bond, with a direction that it shall not be levied upon Samuel Steele. This is precisely the course which would have been the consequence, if he had obtained his absolution by application to a court of equity. As to the objection, that David would be liable to Samuel for costs, etc., *non constat* that they will accrue; for if Samuel pays without execution, they will not; and the bare possibility of such a contingent liability is not sufficient to disqualify a witness: 2 Stark. Law Ev., pt. 4, pp. 744-746. Then, as to the merits: the county court, who had the witnesses before it, after hearing the evidence of both parties, was of opinion, that a compromise and adjustment was made between the creditor and principal, without the surety's knowledge or consent, by which the creditor agreed, for a sufficient consideration, to receive the sum of two

hundred and fifty dollars in discharge of the execution, to be paid in certain installments; and an *exoneretur* was entered accordingly. What was the evidence before the county court we know not, and can not know judicially, as there is no exception: 4 Rand. 189.¹ We must, therefore, take it for granted, that it was right as to the facts; and if so, the conclusion of the law is inevitable. If, indeed, David Steele's testimony had been incompetent, the judgment must have been reversed, as it might be presumed to have been founded, in part, upon his testimony. But as he is deemed to have been a competent witness, no such difficulty exists.

Upon the whole, I think the judgment of the circuit superior court should be reversed, and that of the county court affirmed.

Judgment affirmed.

CABELL and CARR, JJ., absent.

RELIEF UPON MOTION, commensurate with that anciently obtained by means of the writ of *audita querela*, may be had under the modern practice: *Longworth v. Screven*, 27 Am. Dec. 388.

OBJECT OF THE WRIT OF AUDITA QUERELA: See same case and note.

FRAUDULENT PROCESS MAY BE AVOIDED; so a party decoyed from another state or country on a promise that he shall not be sued, may upon being sued in violation of the promise, avoid the process, and also bring an action for his damages from the breach of such promise: *Steele v. Bates*, 16 Am. Dec. 723, and note 733, where an extensive discussion of the subject is had.

SURETY DISCHARGED, BY WHAT ACTS OF THE CREDITOR.—Wherever the creditor has placed it beyond his power to sue the principal, the surety is *de facto* discharged: *United States v. Simpson*, 24 Am. Dec. 331. And, therefore, wherever time has been given the principal, by contract binding upon the creditor, the surety is discharged: *Bank of Montpelier v. Dixon*, Id. 640; *Sneed v. White*, 20 Id. 175; *Cope v. Smith*, 11 Id. 589 and note; *Buchanan v. Bordley*, 1 Id. 387; *Grafton Bank v. Woodward*, 20 Id. 566. It seems to have been sometimes considered, that in order to discharge the surety, the extension of time should have been prejudicial to him: *Brown v. Wright*, 18 Id. 190; *Butler v. Hamilton*, 2 Id. 690. Mere neglect to sue and indulgence shown a principal, where no binding contract for delay prevents an immediate suit by the creditor, will not release the surety: *United States v. Simpson*, 24 Id. 331; *Bank of Montpelier v. Dixon*, Id. 640; *Caston v. Dunlap*, 23 Id. 194; *Sneed v. White*, 20 Id. 175; *Police Jury v. Haw*, Id. 294; *Cope v. Smith*, 11 Id. 582, and note 589; *Fulton v. Mathews*, 8 Id. 261; *Commonwealth v. Wolber*, 6 Id. 452; *Hunt v. Bridgham*, 13 Id. 458. But it was held in New York, that where a surety became bound on the bond of a loan officer, whose accounts the supervisors were ordered to examine annually, and whom, if a deficiency occurred, they were empowered by law to remove; and deficiencies occurred in 1791, and continued for several successive years, and no notice was taken of the deficiencies prior to 1798, when suits were ordered begun, but were not prosecuted, indulgence being given until 1803,

1. *Cunningham v. Mitchell*.

when new suits were begun, he was discharged owing to the laches; it appearing that in 1798 the principal was solvent, and that had the suits then been pressed, the deficiency might have been collected: *People v. Jansen*, 5 Id. 275; but the case appears overruled in its own state: See note, 5 Id. 279. Where a surety has demanded of the creditor that he sue the principal, and after the request the creditor still neglects to sue, from which follow consequences injurious to the surety, as in case of subsequent insolvency of the principal, there is doubt as to whether or not the surety is discharged. The following cases hold that he would be: *Bruce v. Edwards*, 18 Id. 33; *Cope v. Smith*, 11 Id. 581 and note 589; *Pain v. Packard*, 7 Id. 369, and note 370. To the other view are: *Bank of Montpelier v. Dixon*, 24 Id. 640; *Caston v. Dunlap*, 23 Id. 194; *Manning v. Shotwell*, 8 Id. 622; and see notes to the cases of *Cope v. Smith*, 11 Id. 589, and *Pain v. Packard*, 7 Id. 370.

Where a creditor holds property of his debtor as security for his demand, he will lose his remedy against the surety to the value of the property should the same be released without the surety's consent: *Baker v. Briggs*, 19 Am. Dec. 311; *Lichtenthaler v. Thompson*, 15 Id. 581, and note 588.

On an execution against a principal and surety, the release of property of the principal will discharge the surety: *Dixon v. Ewing*, 17 Am. Dec. 590; *Baird v. Rice*, 1 Id. 497. Staying execution after its levy on property of the principal, whereby the lien is lost, will release a non-assenting surety: *Sneed v. White*, 20 Am. Dec. 175.

Generally, all agreements between principal and creditor, entered into without the assent of the surety, whereby the rights of the latter are impaired, or whereby he is sought to be placed in a situation worse than that originally occupied by him, will work his discharge: *Sneed v. White*, 20 Am. Dec. 175; *King v. Baldwin*, 11 Id. 415; *Commissioners v. Ross*, 5 Id. 383; *Craig v. Coz*, Id. 609.

A novation of the contract between principal and creditor, without the surety's consent, discharges the latter. Where a surety is told by a creditor that the debt is paid, and owing to a reliance upon such statement he loses an opportunity of securing himself, he is discharged though the debt was not paid the statement of the creditor being made under mistake: *Baker v. Briggs*, 19 Am. Dec. 311.

COMMONWEALTH v. HITE.

[6 LEIGH, 588.]

INFORMATION FOR AN INTRUSION is a remedy for trespass on the lands of the commonwealth, and can never be maintained unless the state or the king has once had the possession.

THE KING OR THE STATE CAN ACQUIRE POSSESSION OF ESCHREATED LANDS only by some matter of record.

INQUESTS OF OFFICE were devised to afford authentic evidence of the rights of the king where they are based upon matters *in pais*, but if there be any one in possession of escheated lands, the king, even after office found, is not in possession till seizure by his officer.

IT IS A GOOD DEFENSE TO AN INFORMATION FOR AN INTRUSION that the possession was not in the king by inquest of office because there was an adverse possession held by another.

INQUISITIONS BECAME RECORDS only when duly returned. Before such return the title of the crown was incomplete.

INQUISITIONS MUST BE RETURNED TO A COURT OF RECORD, where they can be contested by traverse, or *monstrans de droit*, or petition of right, and if such return is not shown, the inquisition can not be given effect.

POSSESSION, WITHOUT PRETENSE OF TITLE, is not sufficient to avoid an inquisition.

INFORMATION on behalf of the commonwealth, filed in the circuit court of Cabell county by the escheator of the county for an intrusion on the lands of the state by the defendant Hite. It was alleged that Matthew Jones died intestate and without heirs, and seised of part of a grant of land made to John Savage and others, and known as lot number 45, containing about four hundred acres, as was found, in 1820, by an inquisition of escheat returned and filed in the clerk's office; that Hite had held possession from July 22, 1818, and detained the same from the commonwealth. A special verdict was found by the jury to the effect: 1. That a grant of twenty-eight thousand six hundred and twenty-seven acres issued in 1773, to John Savage, Matthew Jones, David German, and fifty-nine others, and included the lands in controversy. 2. That in 1775 some of the part owners divided a portion of the grant among themselves by verbal partition, and some of them took and ever afterwards held possession of the parts so allotted to them. 3. That in 1809, suit was brought by some of the part owners against the others, to set aside this parol partition; that this suit was not finally disposed of; but in 1817 the chancellor, by consent, appointed commissioners to divide the land, and, as far as practicable, to respect the partition of 1775. 4. That these commissioners made their partition and reported it to the chancellor, by whom it was confirmed. 5. That the defendant Hite was a party to the suit in chancery and answered therein, claiming compensation for improvements, also that he had title to two hundred acres of land derived by sundry conveyances from and under David German, one of the original grantees; that the part set off by the commissioner to German's grantees was lot 47; that the land on which Hite and his grantors had erected the improvements were, by the commissioner, thrown into lots 45 and 61. 6. That the chancellor, in 1821, decreed that the owner of lot 45 pay Hite one hundred and twelve dollars, and the owner of lot 61 pay him four hundred and forty-five dollars for improvements thereon; and that in default of payment the lots be sold to raise the said sums. 7. That the lots, in November, 1823, were sold to pay said sums, and were purchased by Hite, and the sale was approved and a

conveyance made. 8. That lots 45 and 61 each contain four hundred acres. 9. That Hite when he first entered claimed the land under Mansah Bostick, a grantee of David German; but, in the partition of 1775, lot 45 was assigned to Edmond Taylor as assignee of Matthew Jones, one of the original patentees; that in the name of Matthew Jones, lot 45 was escheated in 1820 by inquisition, which stated that said Jones died on the — day of — intestate and without heirs. 10. That there was no evidence of any assignment by Matthew Jones to Edmund Taylor, except that the latter was present at the parol partition, claiming as such assignee, and both in the parol partition and in the subsequent chancery suit was recognized as such assignee; that neither Jones nor Taylor, nor any one claiming under either, had taken or had possession of any part of lot 45. The superior court, on the special verdict, gave the defendant judgment.

The attorney-general, for the commonwealth.

Johnson and Smith, for the defendant in error.

TUCKER, P. An information for an intrusion is a method of redress for a trespass committed on the lands of the commonwealth: it is of the nature of an action of trespass *quare clausum fregit*; and, accordingly, it never could be maintained by the crown, until the king had acquired the possession. The manner of acquiring such possession, is always by matter of record; for it is a well-established maxim of the English law, that the king can neither take nor part from anything, but by matter of record. Therefore, for the purpose of affording this authentic evidence of his rights, where they have devolved upon him by matter *in pais*, as by dying seised without heirs, by alienation to an alien, or the like, inquests of office were devised by the law. These offices are either offices of entitling, or offices of instruction, the former of which have reference to the matter of escheat for want of heirs. Their effect is to vest the possession in the crown by the office only, without seizure on the part of the king, provided the possession be vacant. But if any other except him in whose right the king claims, be in possession at the time the office found, the king shall not be in actual possession till seizure: 3 Bl. Com. 259, 260; 5 Bac. Abr., Prerogative, E. 7, pp. 565, 575; 7 Com. Dig., Prerogative, D. 68, 72, 74, pp. 78, 81. Mr. Justice Story, in *Fairfax v. Hunter*, 7 Cranch, 621, quoting the above authorities, and some cases from the year books, which he had doubtless an oppor-

tunity of examining, says: "Even after office found, the king is not adjudged in possession, unless the possession were then vacant; for if the possession were then in another, the king must enter or seize by his officer, before the possession in deed shall be adjudged to him." From these authorities, it is clear, on the one hand, that the office found vested the possession in the crown, where the possession was vacant at the time; but that if the possession was not vacant, it did not become so vested, and of course the information for intrusion could not be maintained, until there had been an entry or seizure by the officers of the crown.

If this be so, it is equally clear, that it must be a good defense to the information, that the possession was not in the king by the inquest of office, by reason of the adverse possession of another at the time it was found. But though the office found vested the possession when it was perfected by being duly returned, yet until it was so perfected, I conceive it had no such effect. For, as we have already seen, the crown could only take by matter of record, and inquests of office were devised for the purpose of affording authentic record evidence of the title of the crown. But the inquisition itself is no record. It is an indenture between the escheator and the jury, found either *ex officio* or by the command of a writ directed to the officer: 3 Bl. Com. 258, and which he is to return either into the chancery or the exchequer: 5 Bac. Abr. 575, in note; or into the king's bench when the record of conviction and seizure was there. Before such return, no grant or letters patent could be issued by the crown, but all such grants before return were void: 3 Bl. Com. 259. But when returned, then and not till then, the inquisitions became records; then and not till then, the title of the crown was complete, and it became invested with the possession, provided the possession was not adversely in another. And there was great reason for requiring such a return of the inquisition. Its operation being to seize the lands into the hands of the crown, by a proceeding entirely *ex parte*, it was proper so to provide, that any person interested might contest it. It was therefore required that the inquisition should be returned to a court of record, where it might be contested by traverse or *monstrans de droit*, or petition of right, according to the nature of the case. By the traverse, the traverser denied the facts found by the inquisition; by the *monstrans*, he relied on those facts themselves, as showing his

title; and by the petition of right, he disclosed new facts not found by the office: 3 Bl. Com. 260.

But how could this be done, if the inquisition were kept in the pocket of the escheator, instead of being returned to a court, there to have the force of a record, affording notice to all the world of the title of the crown, and an opportunity to all persons interested, of asserting their claims to the property, so seized into its hands? Little foundation, indeed, would there be for the commentator's boast, that "it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury," if such an *ex parte* finding were to vest the title in the crown, without affording those interested an opportunity of contesting it, by having it returned into some court of justice. When so returned, and thereby perfected, the title of the crown doubtless related back to the finding, as in the case of a grant: *Knight's case*, 5 Co. 56 b; but until returned, I can not but think the title was defective, and the possession did not vest. It is scarcely necessary to say, that the provisions of our law, like the law of England, require the return of the inquisition into the courts of record. By our statute, one part is to be returned into the office of the county court, there to be recorded, and the other part is to be returned into the circuit court, within a month after the inquest taken: 1 Rev. Code, c. 82, secs. 2, 8, pp. 295, 296. In this case, the information distinctly sets out, that the inquisition was returned to and filed in the clerk's offices of the county and circuit courts of Cabell; but that fact is not found by the jury, in the special verdict, though they have found and set forth the inquisition itself *in hæc verba*. It is clear, therefore, on this ground, that judgment can not be given for the commonwealth upon this special verdict. Then, as to the matter of defense. The defendant pleaded not guilty, but it was agreed that he might give any other matter in evidence, which he might have pleaded specially. Now, he might have specially pleaded his own possession at the date of the inquisition found; for if he was then in possession, he was not liable to be proceeded against as an intruder: 7 Com. Dig., Prerogative, D. 68, p. 78. Accordingly, he adduced evidence designed, I presume, to show his possession in avoidance of the possession of the commonwealth. But in this he failed; for though he showed a possession, it was a possession without pretense of title.

In another respect also, the verdict is too uncertain to enable us to give judgment. Judgment can not be given for the commonwealth on the findings of the special verdict, because if the grantees in the Savage grant were joint tenants, and the grantee, Matthew Jones, died before the first of January, 1787, when the statute abolishing the *jus accrescendi* among joint tenants, 1 Rev. Code, c. 98, took effect, Jones' right survived to his co-joint tenants; and in that case there was an adverse possession in them, and perhaps in Hite, as tenant in common with them, which prevented the possession from vesting by the operation of the inquisition found itself, without an entry or seizure by the officers of the commonwealth. But the Savage grant not being found, this matter is left in uncertainty. Here, then, are two essential defects in the special verdict, rendering it impossible for this court to know for which party to give judgment. If the inquisition was duly returned, if there was a tenancy in common, instead of a joint tenancy, in the grantees in the Savage grant, or if there was a joint tenancy, and Jones survived to a period subsequent to the statute which abolished the *jus accrescendi*, I should incline to think the commonwealth entitled to judgment; for I do not think Hite ever had such possession of Jones' lot, as to entitle him to hold it against the commonwealth, or Jones' heirs, if such should hereafter appear. If I rightly understand his title, he claims two hundred acres, and only two hundred acres, under German, who was entitled to lot 47, according to the division of 1775, which covered what is, or a part of what is, now lots 45 and 61. Although, therefore, in point of fact, he was in possession of lot 47, yet he claimed the land under German, not under Jones; and when by the new arrangement or division, lot 47 was removed to another part of the Savage grant, and what had been lot 47 was turned into lots 45 and 61, Hite's rights, under German, were instantly transferred according to the new allotment, and what had been lot 47 became the lot of Jones or those claiming his rights, subject, it is true, to any just claim for improvements. Hite, therefore, had neither title, nor possession with claim of title, to lot 45, after the new arrangement, and at the date of the inquest of escheat. He had at most, only an incumbrance, which he afterwards enforced by an *ex parte*, and therefore irregular proceeding; and even this was not perfected until the sale of the marshal to him in November, 1823, at the earliest; which was three years after the inquest found. Upon the whole, I am of opinion, that the judgment must be reversed, the verdict set

aside, and the cause sent back to the circuit superior court for a *venire de novo*.

CABELL and BROCKENBROUGH, JJ., concurred.

Judgment entered by this court: That the special verdict found in this cause is defective and imperfect in the following respects: 1. In not finding, that the inquisition of escheat ever was duly returned according to law; 2. In not finding the grant to Savage and others, so as to enable the court to determine, whether the grantees held as joint tenants or as tenants in common; 3. In not finding, whether Jones died before or after the first of January, 1787, so as to enable the court to determine, whether his title (if he originally held as joint tenant with the other grantees) survived to them, or escheated to the commonwealth; and, 4. In not finding the title of Hite with sufficient precision: and that the verdict is too imperfect to enable the court to give judgment thereon, according to the truth and right of the case: and that the judgment of the circuit superior court is erroneous.

Therefore, judgment reversed, verdict set aside, cause remanded, and *venire de novo* directed.

BROOKE and CARR, JJ., absent.

ESCHEAT, WHAT IS.—Escheat at feudal law was the right of the lord of a fee to re-enter upon the same, when it became vacant by the extinction of the blood of the tenant. This extinction might either be *per defectum sanguinis*, or else *per delictum tenentis*, where the course of descent was broken by the corruption of blood of the tenant. As a fee might be holden either from the crown or from some inferior lord, the escheat was not always to the crown. This doctrine is of no importance in this country, as it neither prevails now, nor even did in the time of the colonies, with the exception indeed of Maryland, wherein escheat were to the lord proprietary: *Thomas v. Hamilton*, 1 Harr. & M. 190; *Carroll v. Hamilton*, Id. 297; *Hall v. Gillings*, 2 Harr. & J. 112.

The word escheat in this country, at the present time, merely indicates the preferable right of the state to an estate left vacant, and without there being any one in existence able to make claim thereto.

The instance of more frequent recurrence of such right occurs in the case of the death of an intestate without known heirs, or with only such heirs as would be incapable of taking, as in the case of aliens where the estate left over was real. But to vest an estate in the state because of the heirs being aliens, it must be that all of the heirs are aliens; it will not suffice that he in whom the estate would first vest were he a citizen, is an alien, for in such case the estate will pass beyond him and vest in the heirs of a more distant degree, who are citizens: *Jackson v. Jackson*, 7 Johns. 214. This is to be understood with the qualification, that this more distant heir does not himself trace through an alien, for as the estate could never have vested in an alien ancestor, so it never could descend to his posterity, who will not

therefore stand in the way of the state's right: *Renner v. Muller*, 44 N. Y. Sup. Ct. 535; *People v. Conklin*, 2 Hill, 67. Where a bastard died without issue, at common law his estate escheated: *Crawford v. Commonwealth*, 1 Watta, 484; *Doe v. Bates*, 6 Blackf. 533. In England it seems to have been held that upon the death of a *cestui que trust* intestate and without heirs, his estate shall not escheat, but shall be held by the trustee: *Burgess v. Wheate*, 1 Eden, 577. This appears to have gone upon the idea that the trustee being in *esse*, and in the legal seisin of the land, he was a tenant possessing capacity to perform the feudal services by which the land was held; that therefore there could be no ground for a seizure by the lord. Of course such considerations can not apply in this country, where lands are allodial, and accordingly it has been held in Maryland, where the question arose, that under such circumstances the estate of the *cestui que trust* would escheat: *Matthew v. Ward*, 10 Gill & J. 450.

The doctrine of escheats will be avoided by courts of equity in the interest of justice by an application of the doctrine of equitable conversion; thus where a testator devised his real estate in Virginia to his executors, to be sold by them, or the survivor of them, the proceeds of the sale and the rents and profits of the land to be given to his sisters, who were aliens, on a bill filed by the escheator of the commonwealth, for an escheat of the lands, the bill was dismissed: *Commonwealth v. Martin*, 5 Munf. 117. So where a conveyance is made to a citizen as a trustee upon an express trust to sell the same as soon as practicable, and to pay over the proceeds thereof to a creditor who is an alien, the trust is valid and does not subject the interest of the alien creditor to a forfeiture: *Ansice v. Brown*, 6 Paige, 448. Where lands escheat, it has been held that they are taken free from all legal incumbrances, or equitable liens, on the same, for the reason that the property of the state can not be affected by a proceeding to which it was not party, and that owing to its exemption from suit, it can not be made an involuntary party to a proceeding: *O'Hanlin v. Den*, 20 N. J. 35; *Den v. O'Hanlin*, 21 Id. 532; *Farmers' Loan and Trust Co. v. People*, 1 Sandf. Ch. 139. At all events it is certain that the right of the state can not be concluded by a sale by an administrator authorized by a court in a proceeding to which the state was not a party: *Sands v. Lyndham*, 27 Gratt. 303; *Henkle v. Shadden*, 2 Swan, 46.

The doctrine of escheats in all of those cases wherein the state was entitled because of the heirs being aliens, has lost its importance, owing to the numerous statutory provisions in the various states, mitigating the severity of the common law rule with respect to aliens: See 1 Washburne on Real Property, secs. 49, 50, where the provisions on the subject in the different states are collected. The term escheat in this country applies to the right of the state to lands purchased by an alien, a right which at common law would more properly be termed a forfeiture.

INQUISITION OF OFFICE—PROCEDURE TO PERFECT ESCHHEAT.—An inquiry or inquest of office is an inquiry made by the king's officer, his sheriff, coroner, or escheator *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels: 3 Bl. Com. 258. It has been a question of some contrariety, whether a proceeding of this nature was necessary to perfect, in the state, a title accrued by escheat, upon the death of an intestate without heirs. But we think that at present the question is not so open as it once was. In *Sands v. Lyndham*, 27 Gratt. 295; S. C., 21 Am. Rep. 348, the law is thus laid down: "It is well settled that an alien may take lands by grant. But while he has

capacity to take he has none to hold, and the lands may at once be seized to the use of the state. But until they are so seized, the alien has complete dominion over them, and his title can not be divested except upon office found. And so if lands are devised to an alien, he acquires a complete though a defeasible title, by virtue of the devise; and this title can only be taken away by an inquest of office, which must be perfected by entry or seizure where the possession is not vacant. In these cases, and there may be others, it seems that the inquisition is necessary, to vest a complete and perfect title in the state. An alien can not, however, take by descent, because the law will never cast the freehold upon one who is incapable of holding, and as the freehold can never be kept in abeyance for an instant, in such cases it vests immediately in the state, without inquest of office. For the same reason, if an alien dies intestate, or a citizen dies without inheritable blood, his lands belong to the state. They vest immediately, without office found. They sink back into their original condition of common property for the general benefit." To a similar effect are *Montgomery v. Dorion*, 7 N. H. 475; *Puckett v. State*, 1 Sneed, 355; *Rubeck v. Gardner*, 7 Watts, 455; *White v. White*, 2 Metc. (Ky.) 185; *Den v. O'Hanlin*, 20 N. J. 31; *Colgan v. McKeon*, 24 Id. 567; *Farrar v. Dean*, 24 Miss. 16; *Crane v. Reeder*, 21 Mich. 24; *Holliman v. Peebles*, 1 Tex. 673.

Opposed thereto, that is, holding an inquest of office necessary to perfect the title of the state, are: *Jackson v. Adams*, 7 Wend. 467; *Wilbur v. Tobey*, 16 Pick. 177; *People v. Folsom*, 5 Cal. 373; *Bradstreet v. Supervisors*, 13 Wend. 546, and the principal case. Of these, *Jackson v. Adams* and *Wilbur v. Tobey* held that the title of the state before office found was so imperfect that a grant by the state prior thereto would pass nothing. But *Jackson v. Adams* was disregarded in *McCaughal v. Ryan*, 27 Barb. 376, where it was held that lands that have escheated may be conveyed before entry, and also in the later case of *Ettenheimer v. Heffernan*, 66 Id. 374.

The principal case was overruled in so far as it held an inquest of office necessary to perfect the title of the state, in *Sands v. Lyndham*, *supra*. A great objection which has weighed with the courts in their arrival at the decision that the title vests immediately in the state in this manner of cases is, that otherwise the fee would for a time be in abeyance; as the state's right in these cases is founded upon the consideration that none exists elsewhere, this consequence would have to flow did not the title vest in the state immediately. It follows, of course, from the prevailing doctrine, that inquest of office is unnecessary to perfect the title of the state; that if the possession of an estate be vacant at the time that the right accrues, the state may enter thereupon; but if held by adversary possession, that it may enforce its right by judicial proceeding in the same manner that a similar right might be enforced by an individual. And that this right can be enforced only by proceeding in a court of justice, it is said in *Sands v. Lyndham*, is all that is meant by the expression that the crown can only take by matter of record.

It has been held that where an inquisition of office has been found in behalf of the people, yet that upon a subsequent traverse of the same, by one who has no more than a bare possession, he is entitled to judgment, if he show that the people have no title: *People v. Cutting*, 3 Johns. 1; but this does not seem to be in accord with *French v. Commonwealth*, 5 Leigh, 518.

Where the right to escheat is because of the lands having come to an alien by purchase whether in the ordinary acceptation of the term or by devise, it seems that the title of the alien remains good until defeated by legal proceedings instituted for the purpose of vesting title to the same in the state:

Goodrich v. Russel, 42 N. Y. 181; *Halstead v. Commissioners*, 56 Ind. 363; and may even maintain an action for the recovery of the possession: *Bradstreet v. Supervisors of Oneida Co.*, 13 Wend. 546; *McCreery v. Allender*, 4 Har. & M. 409. It has been accordingly said in this manner of cases, that it behooved the state desiring to perfect its title against such persons to institute proceedings in the nature of an inquest of office: *Sands v. Lyndham*, 27 Gratt. 291; *Jackson v. Adams*, 7 Wend. 368; *Montgomery v. Dorion*, 7 N. H. 475. But these expressions seem to have been *dicta*. And it seems difficult to assign a reason why the rights of the state could not be asserted in an ordinary action of ejectment. Where an escheat is sought to be established by the state, it is incumbent on it to prove all the facts necessary to give it such right; thus its proof that one has died intestate is of no avail, unless it also prove that the intestate left no heirs: *Hammond v. Inloes*, 4 Md. 138.

CASES
IN THE
GENERAL COURT
OF
VIRGINIA.

HALL v. COMMONWEALTH.

[6 LEIGH, 615.]

JUROR, IMPROPER INFLUENCE ON.—That, on a trial for counterfeiting, the jurors on entering their room for deliberation, find a placard there posted charging one of their number with being a counterfeiter, is no ground for setting aside their verdict or granting a new trial.

THE facts sufficiently appear in the opinion.

By Court, PARKER, J. This is an application for a writ of error to the judgment of the circuit superior court of Kanawha, sentencing the petitioner to ten years' imprisonment in the penitentiary, he having been convicted by the verdict of a jury, of passing a counterfeit bank note, knowing it to be counterfeit. Various errors are assigned in the petition, but several of them do not arise on the record, and the whole matter resolves itself into the question, whether the court ought to have granted the new trial asked for, on the ground that a paper was stuck up in the jury-room, and read by the jury, when they retired to deliberate on their verdict, in which James Sturgeon, one of the jury, was charged with being himself a counterfeiter, and insinuating that he had come to the place of trial for the purpose of getting on the jury. The ground assumed is, that Sturgeon was so excited and distressed in mind by the exhibition of that paper, and his judgment so impaired, that he was unable to give the case a fair, full, and free examination. Without deciding what the opinion of the court would have been, if this allegation had been borne out by evidence, we are of opinion, that the evidence, in this case, proves nothing more

than anger or excitement on the part of Sturgeon, against the author of the writing, without showing in him any want of self-possession, or of a full and free exercise of the mind, when the question of the prisoner's guilt or innocence was put *seriatim* to each juror. The testimony of Sturgeon himself is not in the record, and if it was, it would probably be entitled to little or no weight, because nothing would be more dangerous in practice, than to receive the testimony of jurors after verdict, in relation to their motives, situation, or feelings, when they gave it. His subsequent declarations to several witnesses, show, that he was disturbed and excited at the time he made them; but they do not afford to the court any evidence, that his verdict was at all affected by these feelings; whilst the testimony of the three jurymen in relation to what passed when the question was taken, lead to an opposite conclusion.

We do not see any necessary connection between the placard, and confusion or inability of mind. The charge was calculated, indeed, to arouse in the mind of an innocent man, angry and indignant feelings; but when he came to render his verdict, they might exercise no influence over his judgment. Unless there is a necessary connection between the two things, the court ought at least to be satisfied of the fact of such influence: otherwise, it would be easy for the friends of any accused person to put up such placards themselves, and to secure the certainty of obtaining a new trial, if the verdict should be against him. In this very case, it does not appear who placed the writing against the wall of the jury-room, and it is at least possible that it might have been done by a friend of the prisoner, if the juror was in fact free from all suspicion of the acts and designs charged or insinuated. It is said also, that the jury were tampered with, and an undue influence was attempted to be exercised over them all by the placard; and that one of the jurors was menaced and threatened, and therefore the prisoner was not convicted according to law. The act of which the prisoner complains, was a most reprehensible one, for which the author, if discovered, ought to have been severely punished. But unless this act produced some effect upon the minds of the jurors, and materially influenced their deliberations and verdict, it is not perceived, how it makes the conviction unlawful. If we were to decide, that every attempt to tamper with or to intimidate a jury, or one of their number, whether successful or not, compelled the court to grant a new trial, when it was entirely satisfied that the verdict was fully sustained (as in this

case) by the evidence, we should establish a most dangerous precedent, subversive of the best established principles of criminal law; such a precedent we can not establish. We are of opinion, that the circuit court properly refused to grant a new trial.

There is, however, an error in the judgment, not adverted to in the petition. The prisoner is sentenced to solitary confinement for one tenth of the term of ten years; whereas by the statute of 1832-3, c. 19, sec. 2, the maximum of solitary confinement is limited to one twelfth. The judgment must be corrected in this particular: See *Brooks' case*, 4 Leigh, 671; *Murray's case*, 5 Id. 724.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

APPERSON v. COTTRELL.

[8 PORTER, 51.]

COUNTY COURTS IN ENGLAND, prior to the reign of William I., had jurisdiction of testamentary causes.

ORIGINAL JURISDICTION OF PROBATES belongs in England to the ecclesiastical courts, and to some of the courts baron.

ORPHANS' COURTS IN ALABAMA have general plenary jurisdiction of all testamentary cases; and, except in peculiar cases, this jurisdiction is exclusive.

LOST OR DESTROYED WILL may be established and admitted to probate.

WILL DESTROYED BY THE TESTATOR while insane, may be admitted to probate, if properly proved.

JURY MAY BE IMPANELED IN ORPHANS' COURT to try the issues joined with respect to a will which is alleged to have been duly executed and afterwards destroyed by the testator while insane.

BILL OF EXCEPTIONS is necessary in orphans' court to reserve a question for presentation to the supreme court, and the latter court will not look beyond such bill.

PARTY TO A SUIT IS A COMPETENT WITNESS to prove diligent search for, and loss of a will, deed, or other paper, for the purpose of authorizing the reception of secondary evidence.

REVOCATION OF WILL can not be made by one insane or not of sufficient capacity to understand the nature of his act.

OBJECTION THAT ONE OF THE SUBSCRIBING WITNESSES TO A WILL was not produced and sworn, can not be made for the first time in the appellate court, especially if the record does not show that his absence was not accounted for.

ERROR from orphans' court of Autauga county. The proceeding in that court was to establish the will of James L. Cottrell, a paper purporting to be a copy being produced. The facts are sufficiently stated in the opinion of Judge Saffold.

Goldthwaite, for the plaintiff in error.

Hopkins and Peck, for the defendant in error.

SAFFOLD, C. J. The defendant in error made application to the orphans' court of the county of Autauga, to admit a certain instrument to probate, as the last will and testament of James Cottrell, deceased. His affidavit states, that the instrument annexed, is substantially a copy of a will made by said James L. Cottrell; that he believes, the decedent made no other will; that he was, at the time of making it, of sound mind; that the will was duly attested: that the testator, after making his will, became dissipated, and his mind was thereby impaired, and destroyed; and that, at a time when he was in a state of drunken insanity, and incapable of acting reasonably, and not of sound mind, he tore the will into pieces, and entirely destroyed the same. Wherefore, he prays, that the copy may be proved, and admitted to probate, as the last will and testament of the said Cottrell.

The applicant further deposes, that he has made diligent search among the papers of the deceased, and diligent inquiry among the family and friends, and can find no other will, and believes no other exists.

The widow of the deceased and next of kin, having been cited, by order of the court, to appear, and show cause, if any existed, why said instrument should not be proven and established, as the will of the deceased, Apperson, claiming as heir, in right of his wife, who was a daughter of the deceased, appeared, and entered his caveat against the admission of said supposed will to probate, on the ground, that it was not, in fact, the last will and testament of the deceased; and this, he prayed, might be inquired of by the country. And, for further objection, he insisted, that the said supposed will was not made at a time, when said James L. Cottrell was of a sound and disposing mind: and this also, he prayed, might be inquired of by the country. And, for further reason against granting probate, he alleged, that the instrument presented for probate, was but a copy from the original will of said James L. Cottrell; and, that the original was revoked by his destroying the same; and this he was ready to verify: wherefore, he prayed judgment, etc.

By way of replication, to the several objections, filed against the validity of the will, the applicant denied the facts alleged, in avoidance; reaffirmed those stated in his application and sworn to; and submitted the several issues, to be inquired of, by the country.

Upon this entire replication, Apperson joined issue.

A jury having then been impaneled, to inquire of the validity of the will, on the issues formed as aforesaid, they returned a verdict, finding, "that James L. Cottrell did make a will, of which the instrument produced is, in substance, a copy; and that he was of sound and disposing mind and memory, at the time of making the same; and that it has not been revoked." Thereupon, the court gave judgment accordingly, establishing the validity of the will, and granting letters testamentary to James L. F. Cottrell, the applicant, who gave bond, and qualified, as executor.

On the trial, as is shown, by the bill of exceptions, a copy of the will was produced to the court: before the same was read to the jury, two of the subscribing witnesses to the original were introduced, and testified that the original was made by the deceased, in their presence—that he was of sound mind, at the time of his executing the same; and that he executed it in the presence of the other witness. That, another witness was then called, who testified, that James L. Cottrell, the deceased, did on the morning of his death take the paper, which he said was his will, and destroy it; and, that he believed he was, at the time, in a state of insanity, from intoxication; that he never saw the will of Cottrell, nor did he ever hear it read.

The two witnesses, however, who testified to the execution of the will, proved the same, substantially, before the copy was exhibited to them. Whereupon, the copy was admitted to be read in evidence—to which the plaintiff in error excepted.

It is now assigned, for error: 1. That the court below had no jurisdiction to grant probate of a lost will, or of one destroyed in the manner here alleged—or, to submit the same to a jury; 2. That the court should not have permitted the instrument to be read to the jury, without further proof than was offered.

In England, previous to the reign of William I., the county courts had jurisdiction of testamentary causes; but, after his accession, and the dismemberment of this court, arising from the separation of the powers of the bishop and the sheriff, by whom it had been held, the probate of testaments, and the consequent determination of questions, growing out of them, devolved upon the courts of chancery, the ecclesiastical courts, and some courts baron. To the two latter, it is said the original jurisdiction exclusively belonged, except, that the former would interpose a concurrent jurisdiction, in determinations upon personal bequests, where a discovery and an account of

assets are generally necessary to the purposes of relief. Also, in cases involving matters of trust. And, in cases in which the ecclesiastical courts had not the means of giving effectual relief, the chancery exercised exclusive jurisdiction: 2 Rop. on Leg. 531

The general proposition, however, is maintained in the English cases, that the original jurisdiction of probates, belongs exclusively to the ecclesiastical courts, and to those courts baron, to whom it has belonged, from time immemorial; and that they alone are competent to determine the validity of a will, either of real or personal estate: *Id.* 532; 3 Meriv. 171;¹ 7 Bro. P. C. 437.²

The principle is also recognized by Chancellor Walworth, of New York: 6 Wend. 173.³ He also claims, for the decisions of these courts, a degree of respect, equal to that which is due those of any of the others, in Great Britain, of the same date. He insists, that the high character of the judges, and the review, to which their decisions are subject, on appeal, by a court of delegates, composed of judges of the king's bench, and common pleas, and barons of the exchequer, as well as doctors of the civil law, entitle them to the same weight.

The same, in most respects, may be said of our court of probate; the jurisdiction of the orphans' court to hear and determine this contest, must depend upon the statutes of the state. It is provided, that an orphans' court shall be held in each county, "for taking the probate of wills, and granting letters of administration, on the estates of persons deceased," etc.; "with full jurisdiction of all testamentary, and other matters, pertaining to an orphans' court, or court of probate, in their respective counties." Aik. Dig. 248, 249.

Again, it is said: "The judges of each county court shall have power, within the county, either in open court, or in vacation, to take the probate of wills, grant and repeal letters testamentary, and letters of administration," etc. And, further, that, "in all cases, where it may be necessary to have any matter, depending before said courts, or the judge thereof, on any return day, tried by a jury, the sheriff, by order of the judge, shall, forthwith, summon and impanel a jury.

From these provisions, it would appear, that the orphans' court has, in general, plenary jurisdiction of all testamentary cases; and, that the statutes deny this cognizance to any other tribunal, even to chancery; except, in peculiar cases, requiring the exercise of its extraordinary powers: such, for instance, as involve

1. *Jones v. Jones.*

2. *Kerick v. Bransby.*

3. *Beth v. Jackson.*

matters of trust, and require an account to be taken; or, where, for other purposes, a discovery, on oath, from a party in interest is essential to the merits of the controversy. In cases of this kind, the powers of chancery would not be restricted, by the jurisdiction of the orphans' court, more than by that of any other court of law, where their interposition is equally necessary.

In the case before us, I perceive no necessity for the extraordinary jurisdiction. Taking the proof, that a will was once made, and duly executed by the testator, in the presence of competent witnesses, is one of the most common duties of the orphans' court. It is true, that this case required the establishment of the further facts, that the destruction of the original was the effect of insanity, and that the paper exhibited was, in substance, a copy. But, if these facts were susceptible of proof, by indifferent witnesses, in a court of law, and the orphans' court possessed all the requisite means to determine the truth of them, the effect of the statutes quoted must be, to deny the jurisdiction to any other court.

The facilities of this court to try questions of the kind, are greater than those of a separate court of chancery, from which issues of fact must be sent to the courts of law for trial. They are just the same with those of the chancery, under our organization, which unites the common law and chancery powers, in the same tribunal, and which is provided with a jury, for the trial of issues necessary to either.

In addition to the general authority of the orphans' court to cause juries to be impaneled, in all cases where necessary, as previously referred to, the same statute further provides, "that when the validity of any will shall be contested, or doubts may arise as to its validity, or as to any facts, which, in the opinion of the judge, it may be necessary to have ascertained by the verdict of a jury, before awarding any order, judgment, or decree, such judge, at any stated session, or on any sitting held in vacation, according to the provisions of this act, may, forthwith, cause a jury to be summoned and impaneled, to try such issues, or inquire of such facts, as, under his direction, shall be submitted to their decision; and shall cause them to be sworn in such form as the case may require: Aik. Dig. 251.

It is objected, on the part of the plaintiff in error, that this was not a proper case for the application of this power—that a jury is authorized only in cases where doubts may arise, as to the validity of the will, etc.; and here it does not appear that

any doubt was entertained. He also contends, that the word "or," preceding "doubts," in the commencement of the section, should be construed, "and," so as to require both the contest and doubts, to authorize an issue to the jury.

I own, I can not perceive the force of these positions. The circumstances of the case appear to have been sufficient to create doubt; especially after the tender of the several issues by the parties, in addition to the affidavit of the applicant for the probate: and, the award of the *venire* implies an opinion of the necessity for an ascertainment of doubtful facts. I find no cause to suspect any typographical error, or other mistake in the words of the statute; nor do I perceive any objection to it, according to its literal import.

Then, from the language of the statute, a contest merely concerning the validity of a will, or doubts entertained, authorizes an issue to the jury. That this was the intention of the act, is, also clearly indicated in the conclusion of the section, where the jury is required "to try such issues," or inquire of such facts, as shall be submitted to them: also, by the direction, that they shall "be sworn, in such form as the case may require." If they had been intended to try issues only, the uniform oath to try the issues submitted would have been sufficient, and that alone, we may presume, required.

Another conclusive answer to this objection is, that the issues were voluntarily tendered and joined, by the parties, after which neither is at liberty to object to this mode of ascertaining the facts.

In reference to facts properly triable on issues thus submitted, I understand the principle to be conceded, that there is no necessity for spreading on the record the evidence adduced on such trials, except where a bill of exceptions is claimed, as in other cases of jury trials. Whether conceded or not, I think the principle sufficiently obvious.

In chancery, where causes of this kind, as well as other controversies, are prepared for hearing before the chancellor, the evidence appears, of course, in the form of written depositions. Then it is a matter resting in the sound discretion of the chancellor to award a feigned issue, to inform the conscience and judgment of the court of matters of fact involved in doubt and difficulty. The trial by jury is supposed to afford advantages for eliciting the truth in relation to contested facts, superior to any other institution. But the court alone has power, if it will, even in doubtful cases, to decide for itself, without invoking the

aid of a jury: 2 Atk. 295;¹ 2 Ves. 256;² Berd. Ch. 100; and the verdict, in such cases, is not conclusive upon the court; it is but evidence addressed to its judgment, and if it does not produce conviction, it may be disregarded: 11 Wend. 227.³

The order for an issue may be reversed by the appellate court, but it is incumbent upon the party seeking such reversal to show, that, upon the evidence as it stood, he was clearly entitled to a decree upon the matter of fact involved in the issue: 11 Wend. 227.

The powers of an orphans' court, and of this appellate court, are conceived to be similar, except as to the manner of adducing the evidence, and the form of proceedings. It was therefore incumbent on this plaintiff in error, if he conceived there was error in awarding the issue, in the trial thereof, or in the judgment of the court, to have reserved the question by bill of exceptions. Proceeding, as we are left to presume, under this impression, after assenting to the issues and entering upon the trial, he causes points to be reserved; all, we may suppose, on which he felt himself aggrieved, in the form of a bill of exceptions; to this, therefore, we must look for error, if any.

The exceptions taken disclose the ground of the second assignment of error, that the court permitted the copy of the will to be read to the jury, as evidence, on the proof adduced.

What was that proof? As heretofore shown, it was, that, before reading the copy, two of the subscribing witnesses to the original, swore that the original was executed in their presence; that the testator was of sound mind at the time; that he executed it also in the presence of a third witness; and farther, they proved the contents of the will, substantially, before the copy was exhibited to them. That another witness testified that the deceased, Cottrell, on the morning of his death, took a paper, which he said was his will, and destroyed it (witness knowing nothing more of the contents), and he believed he was, at the time, in a state of insanity, from intoxication. This, it is also to be observed, was after the defendant in error, who was the applicant for the probate, claiming an interest under the will, had, in the form of an affidavit, accompanying his application to the judge, stated all the facts relied on to establish the will, and among others, that he had made diligent search among the papers of the deceased; also, diligent inquiry among the other members of his family and his friends, could find no other will, and believed no other existed.

1. *Miscited.*2. *Rigden v. Vallier.*3. *Idley v. Bowen.*

No question appears to have been raised as to the necessity of his repeating these declarations before the court, as a foundation to the secondary proof; nor as to the right of the adverse party to cross-examine him, or have other questions propounded. Hence we are to presume that no right of cross-examination was denied, and that the affidavit was supposed to embrace all the requisite facts.

A party to a suit, or other interested person, is competent to make proof of diligent search for, and loss of, a deed, will, or other paper, so as to lay a foundation for the introduction of secondary, or inferior proof of its execution and contents; such proof being addressed solely to the court: 1 Stark. Ev. 349, note 1, and references, 4 Cow. 483;¹ 6 Wend. 178. If the rule admits of any qualification, such as that the person offering to make the proof was the keeper of the papers, trunk, or the like, necessary to be searched (a restriction applying more properly to public officers), still, this party was competent, inasmuch as he was the only son, and, after the death of his father, entitled to, at least, as much control as any other person. The extent of the search and inquiry made, and the authority of the party in interest to make it, were, doubtless, sufficient for the object of it, as shown by the last case referred to.

It is also to be observed, that the non-existence of the will, did not rest alone on the proof by the party to the court; he introduced before the jury evidence tending to establish the fact that the original had been actually destroyed, and under circumstances which did not affect its validity: that the testator, on the morning of his death, in a fit of insanity, had torn up a paper, which he then said was his will. The declaration as to the identity of the paper is to be considered as *pars rei gestæ*, except so far as the insanity could weaken its force. I think, however, there would be nothing extraordinary in the idea that one might be enabled perfectly to know and truly declare the nature of an instrument before him, while his mind was so impaired as to be incapable of either executing or revoking a will. If such was the situation of the testator at the time of destroying the instrument, the language connected with the act might serve to identify the paper: 4 Cow. 490. Whether this was the state and condition of the testator at the time--whether he destroyed an instrument, and how far his expressions at the time should convince the mind respecting its identity, were questions very proper for the consideration of the jury.

1. *Dan v. Brown*; 8. C., 15 Am. Dec. 395.

The finding these questions in favor of the application for probate, could avail nothing, without the farther finding that the original will was duly executed; also, the contents; for which purpose the evidence of the other two witnesses had been introduced. If the evidence satisfied the jury on all these points, and that the contents agreed, substantially, with the copy exhibited, it was their duty to find as they did.

In *Idley v. Bowen*, 11 Wend. 227, it was ruled that the destruction of a will, even by the hands of the testator, will not amount to a revocation in law, unless he had, at the time, sufficient capacity to understand the nature and effect of the act, and that, although the instrument is not in being, its contents having been satisfactorily shown, there is no difficulty in establishing it as a will, if it is shown to have been improperly destroyed: See also *Trevelyan v. Trevelyan*, 1 Ph. 153. The principle that an act resulting from insanity can not operate as a revocation of a will duly executed and published, is believed too obvious to require elaborate investigation. I therefore only add the authority of Williams on Executors, vol. 1, p. 209, that, "if a will be wholly or partially canceled, or destroyed by the testator whilst of unsound mind, probate will be granted of it, as it existed in its integral state, that being ascertained." The same authority, however, maintains, that, in such cases, the proof must be clear and satisfactory.

If the competency of two witnesses, only, to prove the due execution and contents of the original will, could be considered as having been sufficiently brought in question to require the opinion of the court, I am not prepared to say that they were sufficient, especially if objected to, for want of the third, and his absence unaccounted for. The will embraces real as well as personal estate, and, by statute, three subscribing witnesses are required. They are designed to ascertain and judge, with the greatest certainty, of the testator's capacity to dispose of his property, as well as that he did so with requisite solemnity. Whether the heir had not the right to insist on the testimony of all three before probate could be granted, provided they were all living, and within the jurisdiction of the court, is a question, which, when duly presented, may require deliberate consideration. In the case of *Chase et al. v. Lincoln*, 3 Mass. 236, the principle was so ruled; but it was at the same time said, if it be impossible to produce any one of them, the court would proceed without him, *ex necessitate rei*. In the case of *Dan v. Brown*, previously cited, the

will, as in this case, appeared from the testimony of two witnesses, to have been subscribed by them; and one of them further stated, that it was also subscribed by a third witness, whose name he did not recollect, but he had no doubt of his being a credible witness. There, as here, the object being to establish a will, which had been lost or destroyed, the court held that this was all the evidence that could be expected under the circumstances of the case, and that it was *prima facie* sufficient.

In this case, however, it is an important fact, that no objection appears to have been made below to the competency of these two witnesses alone, to prove the will; that the only objection made, or exception taken, was, that on the testimony of the two subscribing witnesses, relative to the due execution and contents of the will, and of the one other witness concerning the destruction of the original, the court admitted the copy as evidence to the jury. It does not appear but that the absence of the third subscribing witness was accounted for; that any question was made, or any opinion of the court given, respecting the necessity of producing him, in order to the establishment of the will. It is not shown, that any instructions to the jury were given, or requested, whether all the evidence received was sufficient for this purpose; nor does it appear what other evidence, or whether any, was adduced before the jury. Under these circumstances, I am of opinion that no error is shown in permitting the copy to be read as evidence.

In reference to the argument that there is no sufficient showing that the testator remained insane, after the destruction of his will until his death, so as to prevent his supplying a new one, had he chosen not to die intestate; and to any other objection respecting the extent of the questions propounded, and answered, it is deemed sufficient to remark, that the issues were sufficient to embrace the entire controversy, and the jury having passed upon it, the legal presumption is, in the absence of any showing to the contrary, that the evidence justified the verdict; and as to the continued insanity of the testator, if proof to this effect were admitted to have been necessary, the evidence of his having been so on the day—"on the morning of his death"—might justify the inference that it continued until the moment. Or if the contrary presumption could be indulged, a knowledge or recollection of the acts of his insanity would by no means follow, as a necessary consequence of the restoration of his reason. It is therefore unnecessary to in-

quire on whom the burden of proof, in this respect, devolved; or, whether, supposing him to have had the subsequent knowledge, some public recognition of the validity of the insane act, was not necessary to give it effect. This view of the subject derives additional force from the consideration that these, with other objections, were embraced by the issues to the jury, and no question in relation to them has been reserved by the bill of exceptions.

In my opinion, the judgment of the orphans' court should be affirmed, and such is the unanimous opinion of the court.

ORIGINAL JURISDICTION TO TRY THE VALIDITY OF A WILL of personalty is in the probate courts: *Collen v. Ross*, 22 Am. Dec. 648 and cases in note.

AFTER EVIDENCE OF THE LOSS OF A WILL, parol proof of its contents may be given: *Wilnot v. Talbot*, 1 Am. Dec. 374; *Reeves v. Booth*, 12 Id. 679.

SUBSCRIBING WITNESS TO AN INSTRUMENT must be produced to prove its execution: *Zerby v. Wilson*, 17 Am. Dec. 577; but this is unnecessary if he reside out of the state: *Barringer v. Sneed*, 20 Id. 74.

LECATT v. SALLEE.

[3 PORTER, 115.]

AGREEMENT BETWEEN ATTORNEY AND CLIENT, while the relation continues, by which the former secures a gift or a larger compensation than was stipulated for when he undertook the business, is invalid, and its enforcement will be restrained.

THE facts are sufficiently stated in the opinion.

Goldthwaite, for the plaintiff in error.

Sallee, for the defendant in error.

HOPKINS, J. The plaintiff in error filed the bill in this case, on the chancery side of the circuit court of Mobile county, for an injunction and relief against a judgment at law, in favor of the defendant, and states, that in 1825, he employed the defendant, who was an attorney and counselor at law, to institute and prosecute suits for several lots of land in the city of Mobile, to which the defendant had a claim. That, in consideration of the services to be rendered by the defendant, the complainant gave him his note for eight thousand dollars, subject to conditions expressed in an agreement, signed by the defendant, and which was appended to the note; and that one of the conditions was, that if there should be no lot recovered, the note should be given up and canceled. A copy of the agreement forms a

part of the bill, and shows that the note was to bear no interest during the pendency of the suits. The other material allegations are, that some time after the note and agreement were made, a judgment was rendered against the complainant, in favor of the defendant, for the full amount of the note, upon an agreement between them, that the judgment should be subject to the same conditions to which the note was. That some of the suits had terminated in the success of the complainant, and others were undetermined. That he had paid a larger sum upon the judgment than the value of the lots recovered, entitled the defendant to receive; but that he claimed the full amount of it, and had caused an execution to issue, to collect it.

The defendant admits the note was made upon the consideration, and that he executed the agreement stated in the bill, but he denies that the judgment was taken subject to the conditions to which the note was. He alleges that the improvident sale, by the complainant, of a part of the property, and his waste of the proceeds, induced him to inform the complainant that he would decline prosecuting the suits, unless the complainant would confess a judgment for the amount of the note, upon which an execution to obtain satisfaction might issue, whenever the defendant chose; and, also, convey to him one of the lots as security for the judgment, until the complainant could put him into possession, when the conveyance should become absolute, and operate as a payment on the judgment, to the amount of the appraised value of the lot.

To this new agreement, proposed by an attorney to his client, it is alleged in the answer, the latter assented, and that the judgment was taken, subject to it, in February, 1826.

It does not appear, that any of the suits had been determined, when an agreement was made that a judgment might be rendered upon the note. From the time of the commencement of the relation between the parties, the inference is, that none had been decided.

It is unnecessary to determine whether the judgment was taken on the agreement alleged in the bill, or upon that set up in the answer. If it were rendered upon either, the same question arises, which is presented also by the facts charged and admitted. That the note was given, subject to the conditions contained in the agreement, both parties affirm. That an unconditional judgment was taken, for the full amount of the note, twelve or thirteen months after the execution of it, and the employment of the defendant, as attorney, he admits.

Both affirm it was rendered upon an agreement, but each differs from the other, in his statement of what the agreement was. That the defendant claims a right to the full amount of the judgment, the complainant alleges, and he admits.

Upon these facts, the question arises, can an attorney, during the connection between his client and himself, make, with his client, a binding contract to secure to himself greater compensation for his services, than was agreed upon when their relation commenced?

The question has never before been presented to this court, but it has been often determined in England. There, it is a settled doctrine of equity, that an attorney can not, while the business is unfinished, in which he had been employed, receive any gift from his client, or bind his client in any mode, to make him greater compensation for his services than he would have a right to demand, if no contract should be made during the relation. If an attorney accept a gift from one thus connected with him, it may be recovered, in a court of chancery, by the donor or his creditors, should it be necessary for them to assert a right to it to satisfy their demands.

If a bond, or any other security for a greater compensation, be taken from a client, by his attorney, during their connection, it will, upon an application to a court of equity, be either set aside or allowed to stand only as security for the sum to which the attorney would have been entitled if no such security had been given. In some of the cases the prohibition comprehends all dealings between attorneys and their clients; in others, it is confined to the particular business which was the inducement to form the relation, and an attorney is allowed to enter into contracts with his client upon any matter which is not the object of his concern as attorney. The principle thus limited, we deem the most reasonable.

In the case of *Newman v. Payne*, 2 Ves. jun. 200, Newman, the complainant, after his relation as client had commenced with Payne, his attorney, promised to give Payne one thousand pounds when he should be able, upon coming into the possession of an estate, to which he would succeed upon the death of his uncle without issue, and gave a memorandum, stating the promise and condition, to induce his executor in the event of his death to fulfill it. Afterwards, he made his bond to pay the thousand pounds at the death of his uncle, absolutely, and subsequently he created a term of sixty years upon his reversionary interest in an estate as security for the bond. The

chancellor who heard the case said, that such bonds were commonly put among cases which hold, "that upon general considerations of policy, the court, without entering into the means used, or the character of the parties, but merely upon the relation of attorney and client, will not suffer them to stand." By his decree, the bond and deed which created the term were set aside.

In *Walmesly v. Booth*, 2 Atk. 29, a bond obtained by an attorney from his client, during their relation, was set aside, upon the same ground. Lord Hardwicke, who made the decree, remarked: "I am of opinion that the court ought to pay no regard to such a bond, as it might be attended with bad consequences, by encouraging attorneys, after they have got into the secrets of their clients, to extort from them unreasonable rewards to themselves." He said, also, that the reason the court goes upon, in such determination, is the great power and influence that an attorney has over his client.

In the case of *Oldham v. Hand*, 2 Ves. sen. 259, the court said, that Booth, the defendant in the case referred to in 2 Atkyns, refused, after he was employed, to endeavor to obtain bail for his client, until the bond should be given; but the report of the case contains no such fact.

In the case of *Montesquieu v. Sandys*, 18 Ves. 312, the court recognized the principle to be, "that an attorney shall not take from his client a gift, or reward, while standing in that relation, the connection between them subsisting with the influence attending it, though the transaction may be as righteous as ever was carried on; that the connection must, as in the instance of guardian and ward, be *bona fide* dissolved before he can take anything beyond his regular fees:" See also 18 Ves. 119, 123,¹ and the cases there cited.

The counsel for the defendant attempted to maintain the position, that such contracts, between an attorney and his client, in this state, were not within this principle, because attorneys here do not form a class in the profession of law separate from that of counselors, as they do in England, and the laws of the state do not prescribe the fees for services performed by attorneys, or authorize the appointment of officers to tax their bills of costs.

It is true there is a difference in these respects, between attorneys in that country and in this state. There, they and solicitors have a right to be paid such reasonable fees as have

1. *Wood v. Downes*.

been long settled in the profession, and allowed in the different courts and in common law and chancery business; there are officers of each of the courts, whose duty it is to tax their bills of costs. In England, a counsel has no right to an action for his fees, for they are given to him, not as hire, but as a gratuity. If he had a right to demand fees, his contracts for them, entered into after his relation with a client had commenced, would be, doubtless, within the principle which governs such contracts with an attorney.

In this state, attorneys and solicitors, when they undertake to do business, may make the measure of their compensation a part of the contract, by which they agree to perform the services needed; and such a contract would be as binding upon the client, as any one into which he could enter.

If the amount of compensation be not fixed, by the terms of the contract, by which an attorney or solicitor was employed, he would be entitled to be paid such reasonable fees, as have been usually paid to others, for similar services. Counselors and attorneys are not separate classes, here: each attorney is a counselor—every counsel, an attorney; and, for all services performed by one, in whom the two characters are united, an action for fees may be maintained.

In this case, the fee for the services was settled by the contract between the parties: the same contract, by which the attorney undertook to bring the suits for the complainant. The complainant knew, with certainty, what he would be bound to pay, in case of success in all his suits, or in any other event.

A client does not know the amount of the bill of costs he will be required to pay his attorney, for a suit in an English court. He knows the fee for each service is settled; but he can not know how many affidavits may be made, and other things done, which may, or may not be necessary, in the progress of the case to which he is a party.

As the contract which produced the relation between the parties in this case, ascertained the fee of the defendant, it was as irrevocably settled, as though a rule of law, which tolerated no contract upon the matter, had fixed it.

By the agreement, subject to which the note was given to the defendant, he was not to be entitled to any fee, should no lot be recovered. But the judgment, in the same event, gave him a right to collect eight thousand dollars, the whole amount of the note. Upon the first contract, he was not, in any event, entitled to interest upon the note, during the pendency of the

suits. But the judgment bears interest from its date. All the rights derived from the judgment would be exercised, if it were beyond the control of a court of equity.

The firmest ground for the support of the principle to which the complainant has resorted for relief, consists of the confidence reposed by a client in his attorney, and the influence which an attorney has over his client. Confidence is as necessarily reposed here, by a client, in his attorney, as it is in England. The influence of an attorney, during the connection, is as great here as it is there; and no consequence, against which it is the object of justice to guard, could attend such contracts there, which would not follow them in this country. Integrity of character and purity of motive, have never enabled such contracts to stand in full force, against the principle of equity, which commonly excludes all inquiry into the fairness of the transactions, and sets them aside, as violations of the policy of justice. No principle has been more rigidly adhered to, by the English chancellors; and we shall not take the liberty to depart from it.

The principle will best preserve the high reputation of the profession, by elevating its members above the temptation to exercise their influence, to obtain advantageous bargains of their clients; and, consequently, above the suspicion of having done so.

Upon the same reasons, trustees are not allowed to fix the amount of their compensation, by contracts entered into after they have accepted their trusts: 1 Johns. Ch. 529.¹

After the relation has ceased, attorneys have a right to take what may be given to them, or paid, as compensation: 2 Ves. sen. 259.² Their employment in one suit, does not deprive them, while it is pending, of their right to make a contract, for compensation for their services, in another, or for any other professional business, with the same client.

The bill charges, that some of the suits were undetermined, when it was filed. As this fact was in the knowledge of the defendant, and not denied, it must be considered as admitted: 1 Port. 375,³ 3 Bibb, 466,⁴ 539.⁵

The acts of the complainant, relied upon in the answer, to confirm the judgment, were all done during the relation of the parties, and are within the principle which has been applied to the judgment: *Wood v. Downs*, 18 Ves. 119, 129.

In some cases, bonds, given to attorneys, by their clients,

1. *Manning v. Manning*.

2. *Oldham v. Hand*.

3. *Garrow v. Carpenter*.

4. *Kennedy v. Meredith*.

5. *Oldham v. Brown*.

have been suffered to stand as security for the sum which they were entitled to receive: 18 Ves. 126, 129. This course may be pursued, when it does not appear that it will result in injury to the clients.

It is probable all the suits which the defendant agreed to bring for the complainant have been determined, and that he is now entitled to as much of the note as he could ever demand. The judgment will therefore be allowed to stand as security for the balance, if any, that may be due on the note—which must be ascertained, in reference to the condition in the agreement, which was appended to it.

The decree is reversed, and the case must be remanded to the circuit court of Mobile county; in which court such proceedings must be had, as will carry into effect the principles of this opinion.

HARDING v. EVANS.

[3 PORTER, 221.]

ADMINISTRATOR IS PERSONALLY LIABLE for articles purchased by him though they are for use of an estate.

Erwin, for the plaintiff in error.

Clark, for the defendant in error.

SARFOLD, C. J. This being an action of assumpsit, brought by Evans, to recover the price of corn, fodder, oats, etc., sold and delivered by him to Harding, the latter pleaded, and urged as his defense, that, at the time of purchasing the articles, he was administrator of the estate of Alston, and was cultivating and carrying on the plantation, belonging to the estate; and that part of said supplies was purchased for, and applied to the maintenance and support of the plantation; and that, therefore, he was not chargeable with the same, individually, as sued, but only in his capacity of administrator, as aforesaid. The court being requested so to charge the jury, refused to do so: on the contrary, instructed them, that if the articles were purchased by the administrator, after the death of his intestate, though for the use and benefit of the estate, still, the purchaser was responsible, in his individual capacity—that he was so chargeable, without any note or memorandum in writing, this not being a case within the statute of frauds. This charge, and the refusal to instruct otherwise, is the cause assigned for error.

The principle is too clear to require illustration, that the pur-

chaser of articles, while exercising the trust of administrator, is no less responsible for the same, than if he held no such appointment, regardless of the use to which he may apply them.

It is contended, however, that the statute, making it the duty of administrators to continue the cultivation of the plantation, during the residue of the year in which the intestate died, should vary the principle, and make the expenses of the plantation a direct charge against the estate, not against the personal representative.

In this case, it does not appear that the articles were purchased for the support of the plantation, during any part of the year in which the intestate died. But, if it did so appear, neither the statute referred to, nor any other principle of law, would relieve the administrator from liability for the articles purchased by him. The statute provides a sufficient indemnity to the administrator, in cases of this kind (and which is, perhaps, only the same that he could have claimed under the common law)—that all expenses in continuing the plantation may be deducted from the amount of assets which may come into the hands of the administrator. The account for these would be subject to allowance, by the orphans' court, as other charges and expenses, in the management and settlement of the estate.

There was no error in the judgment below, consequently the same is affirmed.

AN ADMINISTRATOR CAN MAKE NO CONTRACTS binding upon the estate, but on all of his contracts, made for the benefit of the estate, he will be personally liable: *McEldery v. McKenzie*, 27 Am. Dec. 643, and cases collected in the note.

VANDEGRAAFF ET AL. v. MEDLOCK.

[3 PORTER, 389].

MORTGAGEE IS NOT ENTITLED TO PROCEEDS OF AN INSURANCE procured by the mortgagor, there being no agreement that such insurance should be effected by the latter for the benefit of the former.

BILL in chancery by mortgagees against Medlock, the mortgagor, to obtain the proceeds of a policy of insurance effected by the latter on improvements on the mortgaged premises, which improvements had been destroyed by fire, and the value of the property as security thereby depreciated. The material facts are stated by the court. The bill was, on demurrer, dismissed.

Wilson, for the plaintiffs in error.

Ellis, Peck, and Porter, for the defendant.

HOPKINS, J. The question in this case is, have the plaintiffs in error, who are mortgagees, a right in a court of equity, to the proceeds of a policy of insurance against fire, effected by the mortgagor after the mortgage was made, which contains no covenants that he should insure?

The facts relied upon to support this right, which they claim, are, that after the execution of the mortgage, that was made to secure the purchase money of the mortgaged premises, which the plaintiffs had previously sold and conveyed to the mortgagor, the houses were burnt down—an event that so greatly diminished the value of the estate, that the mortgage ceased to be an adequate security for the purchase money, and that the mortgagor was insolvent.

The mortgagor is not entitled to receive from the insurers anything in the nature of proceeds of the houses which were burnt; but the proceeds of the policy, which is a different thing. He was bound to pay the purchase money, though the value of the estate might be reduced so low, by fire or any other cause, as to become merely nominal. He effected the insurance at his own expense, and the proceeds of the policy, when he shall receive them, will not be the value of the estate, or any part of it, which he had disposed of to another person, but a substitute for the value, that he had provided by his own contract. This substitute will have been procured with his own money. When the insurers shall pay the loss, they will have received no part of the consideration of the contract, upon which they may pay, from the mortgagees, or from the mortgaged estate, but the whole of it from the general means of the mortgagor. For the mortgage, the plaintiffs gave a consideration, but none for the policy of insurance.

It is well settled that a policy of insurance is a distinct independent contract between the insured and insurers, and third persons have no right either in a court of equity, or in a court of law, to the proceeds of it, unless there be some contract or trust, express or implied, between the insured and third persons. If there were a covenant in the mortgage, on the part of the mortgagor, that he would insure, and in case of a fire, pay the proceeds of the policy, if he failed to pay the debt, to the mortgagees, it would create an express trust in their favor upon the policy, and a bare covenant of the mortgagor to in-

sure the premises, might make an implied trust for them: Hughes on Insurance, 39, 40; Ellis on Insurance and Annuities, or 12 Law Library, 81, 82, 155, 156; 16 Id. 131, 132, top page; 8 Eng. Com. L. 175, 176, 177; 2 Eng. Com. L. Ch. 74; 4 Taunt. 380; 17 Ves. 329; 18 Id. 115; 3 Dow. & Ry. 158.⁴ As there are no such covenants in the mortgage, and no other contract on the subject between the parties, the case is one in which the mortgagor has obtained a contract with his own money, and a court of equity has no more control over the proceeds, to which he may be entitled, than it has over any other debt due to him. If he be insolvent, his other creditors have as just a claim to the proceeds of the policy as the mortgagees. But no creditor could make them liable, by the aid of a court of equity, to satisfy his demand, who had, not before he filed his bill for the purpose, obtained a judgment at law upon the demand, sued out execution, and pursued the latter to every available extent at law: 4 Johns. Ch. 671.⁵

Let the decree be affirmed.

COLLIER, J. I awarded the injunction in this case; consequently do not join in the opinion—but I by no means dissent from its reasoning or conclusion.

INSURANCE BY MORTGAGOR AND MORTGAGEE.—This subject is discussed at length in note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 510.

HOOPER v. PAIR.

[3 PORTER, 401.]

ON TRIAL OF RIGHT OF PROPERTY, the claimant can not impeach for fraud the judgment under which the levy was made.

JUDGMENT BY DEFAULT OR CONFESSION is not evidence of the justness or existence of the debt, as against another creditor of the judgment debtor.

COSTS AGAINST SURETIES OF THE CLAIMANT OF PROPERTY can not be awarded in a proceeding to try the rights of property.

PROCEEDING to try right to certain slaves levied upon under judgment in favor of Wm. Pair, and against Obadiah Hooper. John M. Hooper, the claimant, sought, on the trial, to show that the judgment in favor of Pair was fraudulently obtained, in this, that it was based upon the non-performance of a covenant which had, in fact, been fully performed. This evidence was excluded. Claimant then offered certain transcripts of

1. *Wamhouse v. Cowie.*

4. *Neale v. Reid.*

2. *Os v. Panten.*

3. *Hollingsfel v. Baker.*

5. *Brinkerhoff v. Brown.*

judgments, which, with the rulings thereon, are fully explained in the opinion of the court. Verdict that the slaves were subject to Pair's execution. Claimant took his exceptions and prosecuted his writ of error.

Ellis and Peck, for the plaintiff in error.

Wilson and Crabb, for the defendant in error.

HOPKINS, J. The first question presented by the record, in this case, is, has the claimant a right, upon the trial of the right to property, to prove that the judgment of the plaintiff in execution had been fraudulently obtained by him? Into the competency of such evidence to procure any remedy which the common law or chancery might have afforded to the claimant, if he had not resorted to the procedure allowed by the statute law, it is not necessary, now, to inquire.

The statute, under which the issue between the parties was made, directs, that it shall be so formed as to try the right of property; and the issue in the case was, that the property was, at the time the levy of the execution was made upon it, subject to the satisfaction of the execution: Aik. Dig. 168. The statute neither authorizes an issue which would, nor does the one in the case, question the regularity or justice of the judgment of the plaintiff in the execution. A verdict upon such an issue must be, that the property belongs either to the claimant, or is subject to the execution against the defendant. The right of neither depends upon the judgment: neither claims the property under it. At the time of the trial of the right to the property, the judgment was a link in no one's chain of title to it. That the judgment was just, neither the law nor the issue required the plaintiff to litigate, or authorized the claimant to inquire of. The admission of the evidence, which the claimant offered, to show that it had been fraudulently obtained, would have violated the settled rule, that requires all testimony, not pertinent to the issue, to be rejected.

We shall next inquire of the correctness of the instruction of the circuit court to the jury, as to the effect of the evidence of the claimant which was offered and admitted.

The evidence consisted of a transcript of a record of a judgment by confession, of a court in the state of Tennessee, in his favor, against the defendant in execution—a judgment, founded upon that rendered for him, by a court of this state, by default, against the same defendant—an execution which issued upon the latter judgment, and a sale of the property, by the sheriff,

who levied the execution, to him. Upon this testimony, the court instructed the jury, that a judgment by confession or default, was no evidence against the plaintiff in execution, who was neither a party nor privy to it, that the defendant in execution was indebted to the claimant, when such judgment was rendered. From the commencement of the first suit, to the end of the second, and the termination of the matter, in the sale of the property by the sheriff, no inquiry was, or could have been made either by the court in Tennessee, or in this state, into the existence of the debt, alleged to be due from the defendant in execution, to the claimant. In one court it was confessed—in the other it was demanded; and the defendant did not appear to deny it. If the claimant had made title to the property through a bill of sale, from the defendant to him, which acknowledged the payment, by him, of an ample consideration, such an instrument, without proof, by a witness, that the consideration had been paid, or the payment of it secured, would have been no evidence against the plaintiff, of title in the claimant. A judgment, execution, and a sale, under the latter, form a mode of transferring property, from the defendant to the judgment, to the purchaser under the execution; but, as no point was tried in the cause, the judgment, though it is conclusive evidence, against the defendant to it, that it was for a just demand, is no better proof against the plaintiff in execution, than a bill of sale, without the testimony of a witness that it was made upon a valuable consideration, would be. In this transfer, the knowledge of the consideration for it, or the want of one, is as exclusively confined to the parties, as it would be if the property had been sold by the defendant in execution, to the claimant, in the absence of all persons, who might have been witnesses.

We think there was no error in the instruction: Rob. on Fraud. Con. 488, 489; 1 Marsh. 179. But the court erred, in rendering a judgment for the costs, against the sureties of the claimant.

Let the judgment be reversed, and the proper judgment be rendered, against the claimant.

COLLIER, J., not sitting.

A JUDGMENT MUST BE PROVED by the creditor impeaching a sale as fraudulent; producing copies of the execution is not sufficient: *Sharp v. Wickliffe*, 14 Am. Dec. 37, and note to *Carlton v. King*, 23 Id. 297.

JUDGMENT GIVEN TO DELAY OR DEFEAUD CREDITORS, is as to them void: *Mackie v. Cairns*, 15 Am. Dec. 477.

WATERS v. JONES.

[8 PORTER, 442.]

CHARGING ONE WITH BURNING THE GIN OR COTTON-HOUSE of another, is actionable *per se*.

CHARGE NEED NOT BE DIRECT AND POSITIVE TO MAKE IT SLANDEROUS; it is sufficient that from it the imputation of criminality may be inferred.

SLANDER—**EXPRESSING SUSPICION, OR SPEAKING IRONICALLY, OR BY WAY OF COMPARISON OR INTERROGATION,** may make one guilty of slander.

IDEM.—**TO SAY OF ONE, "I BELIEVE, OR I HAVE REASON TO BELIEVE,"** he committed arson or larceny, is equivalent to charging him with a crime, and is actionable.

IDEM.—**TO SAY OF ONE, "I HAVE BEEN INFORMED HE IS GUILTY OF ARSON,"** the name of the informant not being stated, is actionable.

CHARGING A CRIME ON HEARSAY is slander. Hence it is actionable to say of one, that it is the general opinion of the people in the neighborhood that he burned the gin-house of another.

CHARGING ONE WITH BEING IN A SUSPICIOUS PLACE UNDER SUSPICIOUS CIRCUMSTANCES does not impute a crime to him.

GENERAL CHARACTER OF PLAINTIFF, SUING FOR DAMAGES arising from slander, may be proved by the defendant to mitigate damages.

TRESPASS on the case by Jones against Waters. The declaration contained six counts. It stated that one Francis Coleman was lawfully possessed of a cotton-gin house, stored with cotton; that such house and cotton were, on July 15, 1835, consumed by fire; that defendant Waters wickedly and maliciously, and to injure plaintiff, spoke of and concerning plaintiff certain scandalous, false, and defamatory words. The charges made by defendant are then stated, and numbered consecutively from first to sixth. Their substance is also detailed in the opinion of the court, as well as the substance of the various rulings and exceptions during the trial. Plaintiff recovered one thousand five hundred dollars, and defendant prosecuted a writ of error.

Porter, for the plaintiff in error.

COLLIER, J. The defendant in error, who was plaintiff below, brought his action for slander, in the circuit court of Butler. The declaration contains six counts: to the first, the plaintiff in error pleaded "not guilty;" and to the second, third, fourth, fifth, and sixth, he demurred, separately. The court sustained the demurrer to the sixth, and overruled it as to all the others. Judgment was entered upon the demurrer as to the sixth: and, to the other counts, the record informs us, there were pleas and issues; but what the character of those pleas was, we are not informed.

The first count alleges, that the plaintiff in error charged the defendant in error, with having falsely and maliciously burned the gin-house (a house in which cotton was stored), of Francis Coleman. The other counts all refer to this.

The second and fifth counts allege, in substance, that the plaintiff in error said of the defendant in error, that it is generally believed, in his neighborhood, that he burned Francis Coleman's gin-house; in addition to which, the second count alleges, that such general belief was not denied; and that the defendant in error could not get more than two or three votes for the house of representatives of the legislature of this state.

The third count alleges, that the plaintiff in error said, of the defendant in error, that he could prove, by Edward H. and Hardy Herbert, that the defendant in error burned Francis Coleman's gin-house, or was in such a condition, previous to the burning of it, as caused every person in his settlement to believe that he burned it.

The fourth count sets forth, that the plaintiff in error said, of the defendant in error, that he had been seen, two or three times, and at different times, close about where Frank Coleman's gin-house was burned, in disguise, covered with a sheep or bear skin; and he, the plaintiff in error, could prove it, by Edward H. and Hardy Herbert.

It will be unnecessary to say anything about the sixth count, inasmuch as the demurrer was sustained to it.

It appears, from a bill of exceptions, accompanying the transcript: 1. That the plaintiff in error proposed to inquire into the general character of the defendant in error. The court remarked, that it had rather hear authorities on the point: to which it was replied, that there were no books at hand. The proposition not being further pressed, it was not decided upon, by the court. 2. The court refused to allow the counsel for the plaintiff in error, to allude in any way to a hand-bill (which was shown to a witness, who answered, that he had seen it, or one similar), on the ground, that it was not read in evidence. 3. The court refused, on motion, to instruct the jury, that if the plaintiff in error had offered any evidence, to show the currency of the imputations in his neighborhood, which he was charged with having made, and he merely repeated what was current, such evidence should go in mitigation of damages.

The jury found a verdict for the defendant in error, and judgment was rendered accordingly. And we are now asked

to revise the questions of law, arising upon the bill of exceptions, and the demurrers to the second, third, fourth, and fifth counts.

In reference to the second and fifth counts, they allege, substantially, that the plaintiff in error has said, of the defendant in error, that the general belief, in his neighborhood, imputes to him the burning of Francis Coleman's gin-house.

To burn a cotton-house, is made arson, by statute; an offense involving a great degree of moral turpitude. According to the rule, laid down by this court, to ascertain whether words are actionable, in themselves, to charge one with having been guilty of the crime, subjects the author of the charge to an action for damages. So, to charge one with having burned a house, of the description of any one of those designated by the statute, is equally slanderous, as if the offense was mentioned by name. Nor is it necessary to employ the precise designation which the statute uses: any other terms, of equivalent meaning, in popular understanding, are quite sufficient. The statute does not make a gin-house, *eo nomine*, a subject, touching which arson may be committed; but the terms, "cotton-house," are employed. Now, as a gin-house is a house in which cotton is usually stored, every one understands, that, by a charge of burning it, is intended a house in which cotton is kept; though there might be a gin there, also. We can, then, discover no difference, so far as arson is concerned, between a gin-house and cotton-house.

To maintain an action for slander, it is not necessary that the charge of a crime should be direct and positive—the imputation may be inferred from an indirect communication. Where a defendant expresses a suspicion, or institutes a comparison, or delivers the words as matter of hearsay, or by way of interrogation, or answer, or exclamation, or uses disjunctive or adjective words, or speaks ironically; or, in general, where the statement virtually includes or assumes the commission of the principal act, or a strong suspicion of it: Stark. on Slander, 58.

To say of one, "I believe," or "in my opinion, you are guilty of arson," is clearly actionable. In *Logan v. Steele*, 1 Bibb, 593 [4 Am. Dec. 659], it was held, that an action lay against the defendant, for having said of the plaintiff, "I have every reason to believe that he burned my barn." So, in *Miller v. Miller*, 8 Johns. 58, the defendant said, of the plaintiff, "My watch was stolen out of the widow Miller's [plaintiff's] bar-room; and I have reason to believe Tina Miller took it, and her

mother [plaintiff] concealed it." The court decided that the assertion, "he had reason to believe, that the one took, and the other concealed it, is equivalent to the charge, that the one stole, or took it, and the other concealed it;" and that the allegation, that his watch had been stolen, and he had reason to believe, etc., amounted to a positive averment; for a man only alleges a thing to be so, because he has reason for so believing it.

To the same effect are the cases of *Oldham v. Peake*, 2 Bl. 961, and *Stich v. Wisedome*, Cro. Eliz. 348. See, also, *Brown v. Lamberton*, 2 Binn. 34, and *Bornman v. Boyer*, 3 Id. 515, and *Nye v. Otis*, 8 Mass. 122 [5 Am. Dec. 79].

To say of one, "I have been informed you are guilty of arson," without disclosing the name of the author, are words for which an action will lie: 2 Stark. Ev. 879. Now, as belief is the result of evidence, to say, "I believe you are guilty of the crime," etc., is equivalent to saying "I have such evidence as convinces me you have committed the crime," etc., and is equivalent to a positive charge.

To charge the commission of a crime, upon hearsay, is actionable, as we have already seen. Here, the defendant in error is charged with having been guilty of arson, according to the general belief of his neighborhood. They could not believe without proof, nor could the plaintiff in error have known their belief, had they not expressed it. The meaning of the imputation, then, is, the people of the neighborhood, of the defendant in error, generally, say of him, that they have reason to believe, that he burned Francis Coleman's gin-house. Thus interpreted, the words spoken furnish a good cause of action.

In regard to the third count, the words are charged to have been spoken in the disjunctive, and come within the rule, as laid down in *Starkie on Slander*, 58; so, if a part be actionable, and is not explained away, by the other words used, it is enough. The first branch of the imputation contains words, indisputably actionable. The second branch charges the belief of the neighborhood, founded upon the condition of the defendant in error, previous to the burning, to be, that he burned Francis Coleman's gin-house. This is certainly tantamount to charging, that it is said and believed, that the plaintiff below has committed arson, without furnishing the name of any individual to whom he may resort, for redress; and, according to the view taken of the second and fifth counts, the plaintiff in error is legally chargeable, upon either or both branches of the imputation.

The fourth count imputes no crime directly, nor does it allege a state of facts, from which the commission of one can be necessarily inferred. The words spoken merely charge the defendant in error, with having been in a suspicious place, under suspicious circumstances. These words, more especially when considered with reference to other parts of the declaration, do not charge directly or indirectly, positively or upon suspicion, any act or crime.

In respect to the assignments, founded on the bill of exceptions, we think the circuit court should have allowed the proposed inquiry to be made, into the general character of the defendant in error. That such inquiry was proper, on principle, we have no doubt. A man, whose general character is bad, as having been remarkable for a great want of moral principle, etc., certainly should not receive from a jury the same amount of damages, as he whose conduct through life has continually presented an example of moral beauty.

We find, too, that authority tolerates the admission of such proof: Anth. N. P. 185; 2 Cow. 811 [*Paddock v. Salisbury*]; 1 Root, 354 [*Brunson v. Lynde*]; Id. 459 [*Seymour v. Merrills*]; 2 Id. 149 [*Austin v. Hanchett*]; 2 Hayle, 222 [*Sawyer v. Eifert*]; 2 Nott & McC. 511 [10 Am. Dec. 633]; 3 Mass. 546 [3 Am. Dec. 185]; 6 Id. 514 [4 Am. Dec. 173]; 14 Id. 275 [*Ross v. Lapham*]; 2 A. K. Marsh. 372 [11 Am. Dec. 409]; 3 Conn. 463 [8 Am. Dec. 207]; 1 Binn. 92 [*Kennedy v. Gregory*]; H. Holt Ch. 534.

The proposition, to inquire into the general character of the defendant, seems to have been arrested by the court, *mero motu*, and a desire expressed to hear some authority upon the point. The court must, then, be understood to have arrested the examination, unless authority were offered, to show its propriety. No authorities being at hand, and the court so informed, the counsel had a right to consider its opinion against them, unless they were directed to proceed; and it would not, perhaps, have been quite courteous, to have proceeded in the inquiry, without a favorable intimation from the court.

To the refusal of the court to permit the paper, identified by a witness, to be referred to in argument, by the counsel for the plaintiff in error, there can be no valid objection. The paper was not before the jury, and could only become evidence by being read to them; unless its reading was dispensed with.

The bill of exceptions discloses none of the evidence. We can not, therefore, know whether the instruction asked of the court was pertinent. And, according to the repeated decisions

of this court, we are bound to consider the point presented, as abstract from the merits, and consequently immaterial.

For the refusal of the circuit court to sustain the demurrer to the fourth count of the declaration, and for arresting the examination into the general character of the defendant in error, the judgment is reversed, and the cause remanded.

WHAT WORDS ACTIONABLE PER SE.—The cases upon this subject, reported in this series, are collected in the note to *Gilman v. Lowell*, 24 Am. Dec. 96.

A SLANDER MAY BE REPEATED, without there being thereby given cause of action, if at the time that it is repeated the name of its author is given: *Tallow v. Jaquett*, 26 Am. Dec. 399; but the general rule is, that matter of report can not be given in justification in an action of slander: *Alderman v. French*, 11 Id. 114; *Calloway v. Middleton*, 12 Id. 409; *Anthony v. Stephens*, 13 Id. 497; *Gilman v. Lowell*, Id. 496. It was held in *Treat v. Browning*, 10 Id. 156, that such evidence was admissible in mitigation of damages. But the contrary was decided in *Calloway v. Middleton*, 12 Id. 409, and *Anthony v. Stephens*, 13 Id. 497. It appears from the note to the last case, that the authorities are not uniform as to this point.

CHARACTER OF PLAINTIFF with respect to the crime imputed to him may be shown in this action: *Anthony v. Stephens*, *supra*. In *Eastland v. Caldwell*, 4 Am. Dec. 668, it was said that evidence of the plaintiff's general moral character need not be confined to evidence of the particular species of immorality charged in the words laid. The other cases merely say, that evidence of the plaintiff's general bad character is admissible in mitigation of damages: *Sawyer v. Eifert*, 10 Am. Dec. 633; *Douglass v. Toussy*, 20 Id. 616; *Gilman v. Lowell*, 24 Id. 96; *King v. Root*, 21 Id. 102.

SCOTT, GUARDIAN, v. NELSON, EXECUTOR.

[3 PORTER, 452.]

WILL, INTENTION OF TESTATOR governs construction of; and technical signification of words must yield to testator's intent, as manifest from the whole will.

CHILDREN.—THIS WORD, WHEN USED IN A WILL, does not ordinarily include grandchildren; but grandchildren and great-grandchildren may take under this word, if necessary to accomplish the testator's intentions.

GRANDCHILDREN will be deemed comprehended in the term children: 1. Where it is necessary to give the will any meaning. 2. When other words in the will show that the testator did not use the word children in its ordinary or limited sense.

CONSTRUCTION OF A WILL.—B., by his last will, gave his property to his wife for life, and, at her death, to be equally divided between his children. He then stated that certain of his children had received specified advances, and that his son "Turner, in his life-time," had received one thousand four hundred dollars, and directed that these advances be accounted for before any distribution be made. It was held that a grandchild, who was a son of the deceased Turner, was entitled to receive a share as one of the children.

THE facts are stated in the opinion.

Stewart and Thornton, for the plaintiff in error.

Brown, for the defendant in error.

HITCHCOCK, C. J. This is a writ of error from the county court of Greene county, sitting as a court of probate, to reverse a decree of said court, giving a construction to the will of William Bell. The will is in the following words, viz.:

"1. I will all my real estate to my wife, Elizabeth Bell, for and during her natural life, and, at her death, to be equally divided amongst my children.

"2. I will her the following personal property, to wit: [naming some negroes, and other personalty.]

"3. I will the balance of my property to be equally divided amongst my children: Margary, having received eight hundred dollars; Turner, in his life-time, one thousand four hundred dollars; and Elizabeth Ridgeway, one thousand four hundred; these amounts have to be rendered, by each, to my estate, before they are entitled to an equal distribution with the younger children. Alexander, having received two hundred dollars, to enter a piece of land, has to render that amount into the estate. John, having received one thousand four hundred dollars, has to render that amount into the estate, before he is entitled to an equal distribution. I appoint my friend, John Nelson, my executor," etc.

Turner Bell, who is mentioned in the will as having, in his life-time, received one thousand four hundred dollars, left a son named Turner D. Bell, who, by his guardian, claims the share to which his father would have been entitled, had he been living. The commissioners who were appointed to divide the personal estate, gave him one share. Exception was taken to this, before the court below, who sustained the exception, and decreed that he was not entitled to anything under the will.

The exposition of wills has always been governed by the intention of the testator. He, not being supposed to be acquainted with legal form and language, a greater latitude of construction is permitted, to leave to every one the power to make his own will in his own way. It is emphatically said, that intention is the pole-star in the direction of devises: 2 Burr. 1112;¹ 2 East, 42.²

The words of a will are the means from which to collect the intention; and to arrive at this, the law neither requires nor

1. *Long v. Long*.

2. *Watson v. Fenton*.

expects technical words: 5 T. R. 721.¹ Nay, more: when technical words are used, their technical signification will yield to the testator's meaning, if he explains them. The word heirs, and heirs of the body, are, technically, words of descent. Yet, if it be the intention, these words will be accepted as words of purchase 2 L. R. 1440;² 11 East, 671.³ So, also, issue, children, son, are technically words of purchase; yet they will be accepted as words of descent, if it be the testator's intention: 2 Atk. 582;⁴ 4 T. R. 299;⁵ 5 Id. 323;⁶ 6 Co. 617;⁷ 2 Barn. & Cress. 538;⁸ Doug. 306.

So also, under the word children, grandchildren and great-grandchildren may take, if it be necessary, and proper to effectuate the intention of the testator. And as the true construction of the will, before the court, depends upon the meaning of the testator, in the use of the word children, I shall confine my remarks to that point.

It is admitted, that the word children does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally. There are two cases where it is permitted:

1. From necessity—where the will would be inoperative, unless the sense is extended beyond its natural import; and,

2. When the testator has shown, by other words, that he did not intend to use the word children in its proper actual meaning, but in a more extended sense.

Under the first of them, *Wylde's case*⁹ is found: which was upon a devise to a man and his children. It was held, if there were no children at the date of the will, the father would take an estate tail, and children would mean issue; for it was evident something was intended for children: but none being in issue, they could take nothing except through the father; and he could transmit nothing to them, unless he had an estate of inheritance. It was necessary, therefore, to construe the word "children," issue, on account of the general apparent intention: 1 Rep. on Leg. 69; 10 Ves. 201.¹⁰

Cases under the second head, are such, as when the words "children" and "issue," are indiscriminately used by the testator—thereby showing his intention to use the former word in its enlarged sense, so as to include grandchildren.

In the case of *Wythe v. Blackman*, 2 Atk. 221,¹¹ Colonel Thurston, by a voluntary deed, limited real estate, after the death of

1. *Hardacre v. Nash*.

2. *Goodright v. Pullyn*.

3. *Strong v. Gaff*.

4. *Bagshaw v. Spencer*.

5. *Cooper v. Collis*.

6. *Phelps v. Mulgrave*.

7. Erroneous citation.

8. Erroneous citation.

9. 6 Co. 18.

10. *Radcliffe v. Bushby*.

11. 1 Ves. sen. 197.

himself, and nephew John, and failure of estates in tail male, to John's first and other sons, to four persons—Lady Chary, Mrs. Wythe, and Mrs. Blackman, his three sisters, and the fourth was his niece, daughter of a deceased brother—to sell, and divide the money and meane profits among themselves, naming them, or the respective issues of their bodies, if they or any of them should be dead, upon the failure of such issue of John, viz., to each of them, or their respective children, a fourth part. But, if any of them should be dead, without issue, on failure of such issue of John, then, to their survivors, or to their respective children, equally, if any of them should be dead, leaving issue. John survived the testator, and died after being in possession of the estate, and without issue. The three sisters and niece died before John, the niece leaving no issue. But at the death of John, Lady Chary had three children; Mrs. Wythe, both children and grandchildren, and Mrs. Blackman, grandchildren only. One of the questions was, whether the children of Lady Chary and Mrs. Wythe, were entitled to have the whole estate divided among them, in two shares, or whether the grandchildren of Mrs. Blackman, and the great-grandchildren of Mrs. Wythe, were entitled to participate with them. A question, whether the import of the word issue was to be restrained by the word children, or the word children enlarged by that of issue; and Lord Hardwicke decided, that children, grandchildren, and great-grandchildren were collectively entitled.

In the case under consideration, the testator had, at the date of the will, children whom he names, and one grandchild whom he did not name; and it is admitted, that had he given his estate to his children generally, or by name, without making any allusion to his deceased son, Turner, that the word "children" would be taken in its ordinary sense, and that the grandchildren would be excluded. But, it is contended, that inasmuch, as in the first clause he gives his estate, after the termination of his wife's life, to his children generally; and that, in the third clause, when he comes to dispose of his personalty and the residuum, in which he names his sons and daughters, alludes to the sums they had received in advancement, and requires those sums to be returned to the estate before distribution, and in this clause names his deceased son, Turner, and the share he had in his life-time received, and requires it to be returned also before a division—the testator must have had the son of Turner in his mind, and that he included him in the

general term children, with the others. And in order to strengthen this construction, reference is had to another rule of interpretation, which is, that "effect ought to be given to the whole will, if possible, so that every word ought to have effect, unless inconsistent with the general intention." We are inclined to this interpretation of the will.

Although wills operate from the death of the testator, yet, as a general rule, they are construed from the making; and we are to consider what was probably passing in the mind of the testator when writing his will.

Had the testator, in this case, overlooked the event of his son's death, and had made no allusion to it or to his grandson, the court would not rectify the omission by intendment; as this would be, rather making, than construing the will. But when, as in this case, the deceased's son is named, and the same directions given, relating to his interest, as is given to the rest, can we draw any other conclusion than that he intended that son's interest to be represented in the distribution; and if so, to whom would it go, except to the grandson? Otherwise, the words would be inoperative—with it, we do not interfere with the general intention.

If the testator had made no will, by the general law of descent, the grandchild would, by right of representation, have stood in the shoes of his father, and taken an equal share with the other children. As the testator followed the law of descents, in giving an equal share to his children—in doing which he thought proper to name his deceased son, requiring the same to be done by him, that was to be done by the others—may we not well say, that he intended to follow the laws of descent—and in this instance, construe the term children, into a word of descent, instead of a word of purchase; which, technically speaking, it is construed. Indeed, when a person devises to his heir at law, he can not make him take by purchase, if he devises to him the same estate that he would take by descent: 2 Bl. Com. 241; 1 Salk. 233; 2 Ves. & Bea. 187.¹

Presuming that the testator knew what the law of descent is, are we not bound to infer that from his allusion to his deceased son, he intended only to follow the law of descent, except so far as provision is made for his wife; and that not knowing the technical meaning of the word children, he intended to provide for the grandchild, by bringing into the will the share of his

1. *Welby v. Welby*.

father, and in that way secure what the law would have done without the will?

Indeed, it is admitted in argument, that probably it was his intention, to give a child's share to this grandchild. But, it is contended, that that intention has not been legally expressed; or, if expressed, that it can not be sustained, without violating the known and well-settled rules of law.

It is conceded, by the counsel for the defendant in error, "that in construing wills, every word is to have effect, according to its natural import, and that words of art, are to be construed according to their technical sense; unless, upon the whole will, it appears plainly not to be so intended;" and a list of cases, from 2 Bridg. Dig. 734, are referred to.

The competency of testimony to show that Turner Bell left a son, is not questioned. Now, if the principle, that every word of a will is to be made to have effect, if it can consistently be done, is to be applied to this case—what is more plain than that, in directing that the several advancements, to Margary, to Turner, in his life-time, and to Elizabeth, should be returned to the estate, before they should be entitled to an equal distribution? How can it be denied, that the testator intended to establish a principle of distribution which should recognize the right of the legal representatives of his deceased son Turner, and if so, how can we accomplish that intention, without considering the word "children," in its enlarged and comprehensive sense, as including grandchildren—thereby considering it synonymous with the word "issue?"

If the court, as was done in *Wylde's case*, above referred to, in a devise to a man and his children, considered the father as taking an estate tail, thereby giving the word "children," the effect of the word "issue," to prevent the devise becoming inoperative; and if, as in the case of *Wythe v. Blackman*, where it was not necessary to give the enlarged construction to the word "children," to prevent such a consequence (as there were children in that case), but purely to effectuate the intention of the testator, gave the word the same enlarged sense; surely we are justified in giving it the same construction, in a case where the intention is equally manifest.

But, it is contended, that, to give the will this construction, the court will violate a known rule of law; which is, "that a devise or bequest to one, not in being, at the time of the execution of the will, is void:" and, in farther illustration of this position, it is said, that if the bequest had been made, to

Turner, when living, and he had died before the testator, his heir would take nothing by the will.

These positions of law are not controverted; but their application to the present case is questioned. The devise and bequest are not made to Turner Bell—his death is recognized; and his son does not claim through his father, and as his legal representative—he claims, as being one of the children of the testator, in the sense in which the testator meant to use the word: that is, as one of the issue of the testator. It is undoubtedly true, that if Turner had been alive, at the execution of the will, and the bequest had been made to him, and he had died before the testator, the bequest would have lapsed. The testator, in such a case, having, at the date of his will, fixed the meaning of the word “children,” and having confined it to its technical meaning, the subsequent act of Providence, in removing the heir from this life, before the death of the testator, does not authorize the court to change the construction, so as to accommodate the will to the change of circumstances. The effect of a will may be changed, by courts, subsequent to its execution; but not the intention—if so, it would not be the intention expressed in the will. A testator may, and they often do, anticipate events and provide for them, which may often become the subject of legal construction; but still the intention of the testator is to be preserved: 3 Burr. 1541; 1 T. R. 201; 3 Id. 85, 86; Wils. 297; 2 Barn. & Cress. 69.

The case of *Radcliffe v. Buckley*, 10 Ves. 195, is mainly relied upon, by the defendant's counsel, to support his construction of the will. In that case, James Buckley, by his will, dated the fourth of April, 1799, disposed of all his personal estate, in the following manner: “All the residue, and remainder of my personal estate and effects, whatsoever, and wheresoever, I give and bequeath unto and amongst all the children, lawfully begotten of William Buckley, Henry Buckley, John Buckley, Thomas Buckley, and Ann, the wife of Hugh Shaw, my late brothers and sister, deceased, to be equally divided amongst them, in their respective parents' stead, *per stirpes*, and not *per capita*, share and share alike, if more than one; and if but one, then I give the same wholly to that one.” All the brothers, and the sister were dead, at the execution of the will; at which time there was issue of William Buckley, three children living, and several grandchildren, by four deceased children; the other brothers, also, left children, and grandchildren, by deceased children: Ann Shaw had several children, who were all dead,

at the making of the will, three of them leaving several children. The court decided, that the children, who were living at the date of the will, were entitled to the estate, to the exclusion of the grandchildren.

I shall not go into an extended examination of this will, to distinguish it from the one under consideration. The reasoning of the master of the rolls, in that case, exhibits such material distinctions between that and this, that it will only be necessary to advert briefly to them, in order to show its irrelevancy.

In the first place, the distribution is to be *per stirpes*, and not *per capita*; thereby enacting classes, which is not the case in the will before us.

2. The word "children" was used but once in the will, and to give it the extended construction, in one part of the will, and reject it in the other—to preserve another part, as the different sets of children were to be provided for, was not admissible: here, no such incongruity exists.

3. The will was, confessedly, ambiguous, and the court were seeking to get at the general intention—to do which, they were obliged to exclude the limited intention in favor of Ann Shaw's grandchildren. Here, there is no ambiguity. To let in the grandchild, here, we do not have to exclude any of the others named. And,

4. The fact that the testator expressly referred to the death of his son, Turner, in making the bequest, directing his advancement to be brought into hotchpot, before distribution, shows that his mind was directed to that object, which can only be effected by giving the word its extended signification. There was no such allusion in the will of Buckley, and, though it was proved he knew of the death of Mrs. Shaw's children, yet, the fact may not have been present to his mind, at the making of his will.

In every view, therefore, in which we have been enabled to consider this case, we are satisfied that Turner D. Bell, the grandchild, is entitled to a distributive share of the estate of William Bell, under the will.

The judgment of the court below is reversed, and the decision of the commissioners sustained.

Reversed and remanded.

HOPKINS, J., not sitting.

vices in fee and bequests to his children, exhausting his estate, the testator added, "If any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children," it was held that the word children only applied to the testator's children living at the time of his death, and did not include grandchildren: *Jackson v. Staats*, 6 Id. 376. A devise in general terms to the testator's "children" does not comprehend a posthumous child, so as to prevent it from claiming under the statute, as a child pretermitted by the will: *Armistead v. Dangerfield*, 5 Id. 501. When great-grandchildren may take under a devise to "children and grandchildren," see *Pemberton v. Parke*, 6 Id. 432.

THE INTENTION OF A TESTATOR must be sought by taking the whole of the will together; no part must be rejected to which an operation may be given consistently with the testator's general intent: *Covenhoven v. Shuler*, 21 Am. Dec. 74; *Myers v. Myers*, 16 Id. 648.

BUMPASS ET AL. v. WEBB.

[4 PORTER, 65.]

AWARDS CAN NOT BE IMPUGNED for extrinsic causes, other than partiality, corruption, or gross misbehavior. Error of judgment on the part of the arbitrators is not a ground for vacating their award.

AWARD WHICH APPEARS FROM DIRECT EVIDENCE, or from a state of facts shown to the court, to have been influenced by dishonest motives, or reckless disregard of justice, will not be aided in equity.

AWARD SHOWING ON ITS FACE PALPABLE MISTAKE OF LAW OR FACT may be impeached; but such mistake can not be shown by extrinsic proof.

DEFECT OF PARTIES held not to be sufficient to reverse a decree, if it is regular as to the party appealing.

BILL in chancery by John Webb against Gabriel Bumpass, to establish an award making a partition, and to vest title according to the allotments made by the arbitrators. Bumpass prosecuted a writ of error. The material facts are stated in the opinion.

S. Parsons, for the plaintiff in error.

Stewart and Thornton, for the defendant in error.

COLLIER, J. The defendant in error (who was plaintiff below), became jointly interested with the plaintiff (in error), Gabriel Bumpass, in certain lands purchased of the general government, under the credit system. In 1822, before full payment had been made, they agreed to submit to the arbitration and decision of certain persons, chosen by them, the partition of these lands—Bumpass entering into bond to stand to and abide the decision of the arbitrators. The arbitrators accordingly made their report—particularly designating the respective parcels of land allotted to the parties. Bumpass, disregarding

their decision, transferred to John Till, his son-in-law, the certificate of purchase, for a half section of the land, at the same time informing him that the award was so unequal and unjust, that it never would be carried into effect. The certificate of purchase for another parcel of the land, by agreement, between Bumpass and the defendant in error, was transferred to Tyree Rhodes, John McCracken, M. H. Buchanan, Thomas Meredith, and Gabriel Bumpass, as trustees, to lay off and sell lots for a town. The remaining parcel of land was purchased of the defendant in error, for the joint benefit of himself and Bumpass: and he is now ready, as he states, to convey to Bumpass, his interest under the award. The titles to these several parcels of land have passed from the United States. To the first, it vests a title in Till; to the second, in the trustees we have mentioned; and to the third, in the defendant in error. It further appears, that at the time Till became the assignee of the certificate from Bumpass, that the defendant in error was in possession of the land allotted to him by the award.

On this state of facts, the defendant in error exhibited his bill; the object of which is to give effect to the partition made by the arbitrators. Tyree Rhodes and Thomas Meredith are alleged to be dead. The other trustees, with John Till, are made parties; but nothing said as to heirs, etc., of Rhodes and Meredith, or whether they have left any.

Many depositions appear to have been taken by the plaintiff in error; all of which merely prove that the lands allotted to Webb, by the partition, are of greater value than those assigned to Bumpass.

No proof was taken by the defendant in error.

It does not appear that subpoena was served on defendants below, Buchanan and Meredith, or that publication was ever made—though there was an order for that purpose. Bumpass and Till alone have answered. The decree of the court gives effect to the partition made by the arbitrators, not only as against Bumpass and Till, but also against all the trustees named, as well those who are dead, as those who are living, at the cost of Bumpass and Till.

From this decree, Bumpass alone prosecutes a writ of error to this court.

Where parties constitute a tribunal of their own choice, by the selection of individuals (as they have here done), for the adjustment of a matter of difference between them, neither party can impugn the decision that may be made, for extrinsic causes;

unless it is shown that the arbitrators have been guilty of corruption, partiality, or gross misbehavior: *Alwyn v. Perkins*, 3 Desau. 297; *Herrick v. Blair*, 1 Johns. Ch. 101; 1 Wash. 11; *Id.* 156. This may be proved by evidence direct, or by such a state of facts as leads the mind to the conclusion, that their award was influenced by dishonest motives. It is not enough, to show an error of judgment, or that the matter of difference was unwisely determined: *Morris v. Ross*, 2 Hen. & M. 408.

Now it may be true, that the parcels of land assigned to the defendant in error, may be far more valuable, in the opinions of most men, and yet not follow, that the arbitrators acted otherwise than with the strictest integrity of purpose.

If, however, the disproportion in value, in the respective allotments of land, was so great as to strike the common sense of every man, that there was positive corruption in the arbitrators, or an utter recklessness of the achievement of justice between the parties, certainly a court of equity should hesitate long before it would give effect to a partition thus made.

If the award discovered on its face some palpable mistake of law or fact, which operated greatly to the prejudice of one of the parties, the party aggrieved might successfully impeach it: See cases cited above. But it is incompetent to show by proof, a mere mistake of law or fact: *Pleasants et al. v. Ross*, 1 Wash. 156 [1 Am. Dec. 449].

Equity has often refused its aid to compel the specific performance of hard and unconscionable contracts for the conveyance of lands. And if an obligee, in a bond for the conveyance of title, where the contract is of that character, were to attempt to coerce a performance, equity, in general, would leave him to his legal remedy upon the penalty.

It is not pretended, that the contract between Bumpass and the defendant in error, is obnoxious to any legal or equitable objection, but only that the award made to effectuate that contract, inflicts upon Bumpass severe injustice.

The conclusiveness of the award, except for the causes we have mentioned, precludes the inquiry, whether a performance would be hard or unconscionable, unless it were first successfully attacked by some cause distinctive to its validity. So far, then, as the merits of this cause are concerned, we can discover no error.

The decree is, however, erroneous, for not bringing in, either by personal service of subpoena, or by publication and judgment *pro confesso*, the defendants, Buchanan and McCracken.

It is also erroneous for not making the heirs of Rhodes and Meredith parties to the bill; or else showing that they had none. These were all material parties: they have the legal title to a part of the land in controversy: and to divest it, it is indispensable that they should be brought in. But, inasmuch as Bumpass is alone complaining, and as to him and Till, the decree is regular—Till becoming a transferee of a part of the land, with full notice of the claim of the defendant in error—occupies, in all respects, the situation that Bumpass would have occupied, had he retained the legal title.

In this view of the case, the decree is affirmed.

AN AWARD IS GENERALLY AS CONCLUSIVE as a judgment, and both parties are bound thereby. Thus one party can not be relieved by showing that he forgot to present one of his demands: *McJimsey v. Traverse*, 18 Am. Dec. 43. An award is not evidence with respect to matters not embraced in the submission to arbitration: *Cox v. Jagger*, 14 Id. 522; with respect to all such matters, it is conclusive: *Shackelford v. Purket*, 12 Id. 422; *Curley v. Dean*, 10 Id. 140; and can not be collaterally attacked: *Bulkeley v. Stewart*, 2 Id. 57.

VACATING AWARDS for corruption, fraud, misconduct, and misbehavior of the arbitrators: *Smith v. Culler*, 25 Am. Dec. 580.

ERROR OR MISTAKE OF LAW, appearing on the face of an award, may justify its vacation; but generally, the court will not consider whether an award is wise or unwise: *Pleasants v. Ross*, 1 Am. Dec. 449; *Alken v. Bolan*, 2 Id. 600; *Blackledge v. Simson*, 2 Id. 614; *Hewitt v. State*, 14 Id. 259; *Jocelyn v. Donnel*, 14 Am. Dec. 753 and note; *McCalmont v. Whitaker*, 23 Id. 102.

ARBITRATORS ARE NOT BOUND by positive rules of law: *Jocelyn v. Donnel*, 14 Id. 753 and note; *Ross v. Overton*, 2 Id. 552.

PARTIES, JOINDER OF, in equity: See *Fellows v. Fellows*, 15 Am. Dec. 413 and note.

McGEHEE v. HILL.

[4 PORTER, 170.]

IN CONSTRUING A CONTRACT to deliver a specified quantity of corn and fodder "as early next fall as the same will be dry enough to house, unavoidable accidents only excepted," the failure of crops, arising from drought, will not be deemed an accident excusing the non-performance of the contract.

PART PERFORMANCE OF AN ENTIRE CONTRACT need not be accepted.

VENDOR MUST SHOW THAT HE WAS READY TO PAY according to the stipulations of his contract of purchase, before he can sustain an action against the vendor for non-performance, and this is true whether the vendor was ready and able to perform or not.

TRESPASS on the case upon articles of agreement made by Hill, to deliver five thousand bushels of corn and fifty thousand pounds of fodder. The facts are stated in the opinion.

Thorington, for the plaintiff in error.

Gordon and Goldthwaite, for the defendant in error.

HITCHCOCK, C. J. Several of the questions presented by this record, depend upon the construction of the articles of agreement sued upon.

By them, the defendant below bound himself to deliver to the plaintiff, at his stable, in Montgomery, five thousand bushels of corn, and fifty thousand pounds of fodder, as early next fall as the same will be dry enough to house, unavoidable accidents only excepted, and the plaintiff bound himself, on the delivery of said corn, to pay fifty cents per bushel, and one dollar and twenty-five cents per hundred for fodder.

1. One of the defenses, for the non-delivery of the corn and fodder, and which brings up the question of construction, was, that owing to an unusual drought during the cropping season, his crop fell short, so that he did not raise sufficient to supply his own plantation, and to fill his contract with the plaintiff.

We think this defense not within the terms of the exception. There is no allusion in the contract to the source whence the defendant was to derive his corn and fodder. It was to be delivered at all events, and the "unavoidable accidents" can only relate to the time when it should be delivered, which was to be as early in the fall as the corn and fodder were dry enough to house. This must be the extent of the exception, or it must be rejected, as repugnant to the contract.

2. On the second point, we are of the opinion that the contract was entire, and the plaintiff was not bound to receive a part and not the whole, and if the plaintiff had a right to understand, when the fodder was tendered, from what the defendant then said, that he did not intend to comply with the contract fully, he was not bound to receive any part. This was a fact, proper to be left to a jury, and in order to discharge the defendant, the jury should be satisfied that the defendant did intend to comply fully with the contract.

There was, therefore, no error in the two first instructions given by the court.

3. But in the third instruction there was error.

It is a well-settled rule of law, that when a contract is dependent, as where one agrees to sell and deliver, and the other agrees to pay on delivery, in an action for non-delivery, it is necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was ready at the place to

deliver or not: *Porter v. Rose*, 12 Johns. 212 [7 Am. Dec. 306]; *Rawson v. Johnson*, 1 East, 203. The seller ought not to be compelled to part with his property, without receiving the consideration, nor the purchaser to part with his money, without an equivalent in return. Hence, in such cases, if either vendor or vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent, and can not proceed against the other, without an actual performance of the agreement, on his part, or a readiness and ability; and an averment to that effect, is always made in the declaration containing dependent undertakings, and that averment must be supported by proof: *Bank of Col. v. Hagner*, 1 Pet. 465.

That the contract now before the court is of this description, can not admit of a doubt: *Morton v. Lamb*, 7 T. R. 125; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 Bos. & Pul. 447; 1 Saund. 320, n. 4; *West v. Emmons*, 5 Johns. 179; *Green v. Reynolds*, 2 Id. 207. The instruction of the court, therefore, that if the jury believed, that the credit which the corn and fodder, when delivered, might give, together with the other means of the plaintiff, would have enabled him to raise the money, so as to have been prepared to pay, would be sufficient evidence of readiness, was erroneous.

This principle was recognized by this court in the case of *Anderson v. Garthe*, 1 Stew. 160.

There were peculiar circumstances in that case. Near three fourths of the crop, which had been contracted to be delivered, was paid for before the crop was ready; the time when the crop would be ready, was exclusively within the knowledge of the defendant, and payment did not become due until the entire crop should be delivered. These circumstances, with others, mentioned by the court, relieved Garthe from the application of the above principles in that case.

Let the judgment be reversed, and the cause remanded.

PART PERFORMANCE of an entire contract will not entitle to any recovery, unless, indeed, full performance by one party has been prevented by the act or default of the other: *Helm v. Wilson*, 28 Am. Dec. 336, and cases collected in the note.

WHEREIN MUTUAL AND DEPENDENT COVENANTS EXIST, to sustain an action by one of the covenantees, it must be shown that there was, upon his part, either performance, an offer of performance, or readiness to perform: *Dey v. Dax*, 24 Am. Dec. 137; *Castleberry v. Peirce*, Id. 774; *Bean v. Atwater*, 16 Id. 191; *Cressel v. Cooke*, 11 Id. 610.

ST. JOHN v. GARROW.

[4 PORTER, 223.]

LIMITATIONS.—ANY UNQUALIFIED ADMISSION THAT A DEBT IS THEN DUE, or that a liability therefor still exists, takes the case out of the statute of limitations; for, from such admission, a promise to pay is implied.

ADMISSION TO TAKE A CASE out of statute of limitations may be made to a stranger as well as to the creditor.

ACKNOWLEDGMENT REVIVING A DEBT may be proved under a general replication to a plea of the statute.

ASSUMPSIT against Garrow, as indorser of a bill of exchange. Pleas of *non assumpsit* and statute of limitations. Verdict for defendant. The opinion states the case.

Gordon and Goldthwaite, for the plaintiff in error.

Stewart and Thornton, for the defendant in error.

HOPKINS, J. This was an action of assumpsit, brought by the plaintiff against the defendant as an indorser of a bill of exchange, drawn on the nineteenth day of February, 1825, at ten days' sight, presented to the drawee, for acceptance, which he refused to make, on the twenty-fourth of March, in the same year, and protested for non-payment, on the sixth of April afterward.

Upon the trial of the plea of *non assumpsit* in the circuit court of Mobile county, the plaintiff proved everything that was necessary; and to support the issues which he had taken to the pleas of the statute of limitations, he proved by a witness, that about a year after the bill was returned, the defendant frequently mentioned the bill to him, as a liability which then existed, and assented to an arrangement that was made with a prior indorser, by which more than a year was given to that indorser, to pay the bill. Upon this evidence the circuit court refused to instruct the jury, that proof of the acknowledgment of the debt, within six years before the commencement of the action, removed the bar created by the statute—and did instruct them, that, to take the case out of the statute, an acknowledgment and a promise to pay were both necessary.

A bill of exceptions was taken by the plaintiff to the refusal of the court to give the instruction for which he asked, and to that also, which was given.

We think the principles are settled, that in actions *ex contractu*, any expression which amounts to an admission that the debt was due, or the liability existed at the time, takes the case out of the statute, and revives the original cause of action.

Such an acknowledgment is an implied promise to pay, and is equivalent to an express promise. It has the same effect, whether it be made to the creditor or another person, before the time had elapsed, which would have created, but for the acknowledgment, the bar of the statute, or afterward.

As an acknowledgment revives the debt, proof of the admission supports the cause of action, stated in the declaration, and is proper, under a general replication, to a plea of the statute. A cause of action is held to accrue from the time an acknowledgment is made. The effect of one is therefore the same, whether made before or after the bar of the statute was created. An acknowledgment to be followed by these effects must be an unconditional one, that the debt is due, or the liability exists, when the acknowledgment is made, and not merely that the demand was originally just: *Clementson v. Williams*, 8 Cranch, 72; *Wetzell v. Bussard*, 11 Wheat. 309; *Johnson v. Beardslee*, 15 Johns. 3; 5 C. L. B. 245; *Lonsdale v. Brown*, 3 Wash. C. C. 404; 2 Stark. Ev. 892; *Blanch. on Stat. of Lim.* 140; *Wilk. on Lim. of Actions*, 70.

The acknowledgment in this case was, we think, sufficient to remove the bar of the statute; and the court erred, both in refusing the instruction, for which the plaintiff asked, and giving that to which exception was taken.

Let the judgment be reversed, and the cause remanded.

ACKNOWLEDGMENT TO REVIVE DEBT: See *Neolin v. Duncan*, 25 Am. Dec. 66; *Austin v. Bostwick*, Id. 42, and cases collected in note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

PERKINS v. CATLIN.

[11 CONNECTICUT, 212.]

AN INDORSEMENT IN BLANK OF A NOTE, WHETHER NEGOTIABLE OR NOT, made by a stranger for the benefit of the payee, implies, in the absence of countervailing proof, that such note is due, that the maker shall be able to pay it at maturity, and that it is collectible by due diligence. Such indorsement does not make the indorser a joint maker, nor an absolute guarantor, liable, at all events, on the dishonor of the note.

PAROL EVIDENCE IS ADMISSIBLE TO VARY THE PRIMA FACIE EFFECT of an indorsement in blank, by showing an oral agreement made by the parties at the time of the indorsement; and such agreement, when shown, will be treated as though written over the indorser's signature.

ASSUMPSIT on the following promissory note:

"On the third day of April next, we, or either of us, promise to pay Dennis Perkins, or bearer, one hundred and eighty dollars; value received.

LEWIS CATLIN, jun.

"Sept. 21, 1833.

LEWIS CATLIN."

The note was indorsed "Abijah Catlin." The action was against Abijah Catlin. The complaint, containing three counts, charged in the first that the defendant was a joint and several promisor with Lewis Catlin and Lewis Catlin, jun.; in the second, that plaintiff having a note against said Catlins, which was due, they, in consideration that plaintiff would surrender said note, agreed to give him the note in suit, and that defendant would guarantee its payment when due; that the note in suit was thereupon executed and delivered, and that defendant indorsed the note and thereby promised and guaranteed, that the said L. and L. Catlin should be able to pay when the note fell due, or that defendant would pay the same on request;

that the said L. and L. Catlin were bankrupt when the note became due, etc. The third count, in addition to the foregoing facts, stated that the defendant agreed and promised plaintiff that said L. and L. Catlin should and would pay the note when it became due, and if they did not, then that defendant would pay it, when demanded, etc. At the trial, the note, when offered in support of all the counts, was rejected. Plaintiff then, in support of the first count, offered the note, with parol evidence that it was executed, and was by defendant indorsed on the considerations named in the second and third counts, and subsequently delivered to plaintiff. This evidence was excluded. Then, in support of the second and third counts, plaintiff offered the note, and certain parol evidence tending to prove that the defendant did make an agreement such as was set out in the second and third counts, guaranteeing the payment of the note, if it should not be paid by the makers on demand. The plaintiff claimed that as the indorsement was in blank, he had the right to write, or to consider as written over it, any agreement or understanding at the time entered into between the parties. The court thought otherwise, and, on the objection of the defendant, excluded the evidence. The latter obtained a verdict. The plaintiff moved for a new trial.

P. Miner, for the motion.

Holabird and Woodruff, contra.

HUNTINGTON, J. The record presents two questions for our decision. 1. What is the contract, implied by law, in a blank indorsement of a negotiable note, made by a stranger to the note, for the benefit of the payee, to insure the maker's responsibility, in cases where there is no other proof of the contract, except such as arises from the indorsement itself? 2. Is parol evidence admissible, as between the indorser and payee, to prove the contract which was in fact made, at the time of the indorsement, and which such blank indorsement was intended, by the parties, to consummate?

We had supposed the first of these questions had long since received an answer, by repeated adjudications of this court. At an early period of our judicial history, we find, that the legal nature and effect of a blank indorsement of a note not negotiable, became a subject of investigation and decision. It was always the law in this state, that such an indorsement, *prima facie*, implies a contract on the part of the indorser, that the note is due, that the maker shall be of ability to pay it when it

comes to maturity, and that it is collectible by the use of due diligence. On this point, the decisions have been uniform in Connecticut. And if it be said, that such construction of a blank indorsement is peculiar to this state, it is not the less definitely and judicially settled, because it is confined to our own jurisdiction. We have always rejected the doctrine that such an indorsement constitutes the indorser a joint maker of the note, or an absolute guarantor, creating a liability at all events, on the dishonor of the note by the maker, or a second indorser of the note, and liable only to the subsequent parties to it. Whatever views of this subject may have been entertained, by the courts of other states, the judicial decisions of our own courts have given to such an indorsement an unquestionable signification and legal meaning, which no power except that which makes law, can alter. We are not at liberty, therefore, to consult the adjudications of other judicial tribunals, however enlightened, to aid us in ascertaining what is our law, as applied to this subject. Were the reasons on which it is founded, less obvious and just than we think they are, all inquiry into them, we consider to have been long since closed, by repeated and solemn decisions of the court of *dernier ressort* in this state. If the maxim, *stare decisis*, is worthy a place in our code, and is ever to have an application, the present would seem to be a most fitting occasion on which to apply it. A reference to a few of the authorities applicable to this subject, may not be inappropriate, inasmuch as the point which they profess to settle and put at rest, is again presented for our consideration.

The late Chief Justice Swift, in his treatise on bills of exchange and promissory notes, published in 1810, p. 342, makes the following remarks: A blank indorsement contains a warranty that the note is due and valid according to the terms of it, that it is collectible with the use of due diligence, and that the maker is of sufficient ability to pay it. In his digest, published in 1822, vol. 1, p. 434, he says, an indorsement in blank contains a warranty that the note is due and collectible with the use of due diligence, and that the maker is of ability to pay it. In the case of *Bradly v. Phelps*, 2 Root, 325, decided in 1796, it was held, by the superior court, that in ordinary cases, the indorser of a note undertakes that the money shall be obtained from the promisor, when it falls due, by the indorsee, he using due diligence and taking the remedies which the law has provided; but if the indorsee suffers it to lie, without taking any legal steps

to secure or recover it, the indorser will be exonerated in case of a loss, unless the promisor was absolutely a bankrupt, when the note fell due. In *Williams v. Granger*, 4 Day, 444, decided in 1810, this court said, that an indorsement in common form, is a warranty that the note is due and collectible, by using due diligence. In *Huntington v. Harvey*, 4 Conn. 124, decided in 1821, we said, by uniform and long-continued usage in this state, as well as by repeated determinations, a blank indorsement on a note not negotiable, contains a warranty that the note is due, that the maker shall be of ability to pay it when it reaches maturity, and that it shall be collectible by the use of due diligence. In *Welton v. Scott*, 4 Conn. 527, decided in 1823, we adhered to the previous decisions, and in the fullest manner confirmed them. The subject was much considered, and we declared that by usage for a long period, perhaps immemorial, and by frequent adjudications, the nature of such a blank indorsement has been clearly and definitely established. The court intended to put at rest, if possible, all future controversy relative to the nature of such a contract. In *Prentiss v. Danielson*, 5 Conn. 175 [13 Am. Dec. 52], also decided in 1823, we again repeated, that an indorsement of a note not negotiable, contains a warranty that the maker is of ability to pay it, and that it is collectible by the use of due diligence.

In the argument, our attention was called to two cases, decided by this court, which were supposed to establish the doctrine that a blank indorsement of a note not negotiable, by a stranger, is an absolute guaranty that the note shall be paid at maturity, and that on failure of such payment, the assignee has an immediate right of action against the indorser, in all cases and under all circumstances.

One of these cases is *Beckwith v. Angell*, 6 Conn. 315, decided in 1823. On examining this case, we find no such point decided by the court. The controversy between the parties was confined to the question whether parol evidence was admissible to show that the indorsee agreed to become an absolute guarantor, and that the indorsement in blank was made in pursuance of, and to carry into effect that special agreement. It is true, the judge who gave the opinion of a majority of the court, said, that "had the indorsement remained blank, it must have been considered, *prima facie*, a guaranty or nothing." In what sense he intended to use the word "guaranty," is not, perhaps, entirely obvious. If he meant nothing more than that the blank indorsement was a guaranty that the note should be collectible

by the use of due diligence, it was a mere substitution of the term guaranty for the term warranty. This is in accordance with the fair import of the language used; and is presumed to have been his meaning, especially when taken in connection with what was known by him, as well as the rest of the court, to be an established rule in this state, that such a blank indorsement does not, *prima facie*, import an absolute promise to pay, on the dishonor of the note.

The other case referred to, is *Wylie v. Lewis*, 7 Conn. 301 [18 Am. Dec. 108], decided in 1828. In that case, the note was negotiable, and was indorsed by the defendant in blank, while in the hands of the payee, on a sufficient consideration, and as additional security to the payee. The only point decided by the court, or intended to be decided, was one which required the same decision, whether the indorsement implied an absolute, or a conditional promise. The judge who gave the reasons, does indeed say, that "the legal import of this indorsement, is an absolute engagement to pay at all events." This, however, was, at most, a mere *obiter dictum*, not necessary for the decision of the case; for he adds, "whether it imports an absolute, or a conditional engagement, it certainly does not imply the consideration and contract stated in the declaration." We can not suppose this court intended, in this short summary manner, and in a case not requiring it, to overthrow a usage almost coeval with the establishment of our judicial system, and sustained by numerous adjudications of the highest authority.

We were also referred, by the plaintiff, to a case decided by this court, which, it was supposed, at least by implication, recognized as the law of this state, the doctrine that such a blank indorsement constitutes the indorser a maker of the note, though in the character of a surety, and that the indorsement may be declared on, in the same manner as a declaration is framed against the maker of a note. The case cited is *Palmer v. Grant*, 4 Conn. 389, decided in 1822. It, however, furnishes no support for the position which is advanced. It merely decided, where all the parties to the note were described in the body of it, thus: "We Grant and Wattles as principals, and Daniel Carr and William Grant, surety, promise to pay Cyrus Palmer, or order, sixty-two dollars, with interest, value received"—that all the persons so named were joint promisors, although the sureties affixed their signatures, not in the usual place at the bottom of the note, but on the back of it. The only question discussed or decided, was, whether the mere fact that the sure-

ties put their names on the back of the note, constituted them indorsers; or whether they, as well as the principals, were not original parties to the contract. A majority of the court held, that in the case before them, the defendants shared in the value received, and placed their names on the back of the note, when it was made, describing themselves as sureties and joint promisors with their principals; that the writing, on the face of it, imported one original entire transaction, and the value received was evidence of a consideration embracing the defendants and their principals. This decision did not profess to introduce into our system, any new rule relating to the legal nature of blank indorsements, in ordinary cases, but simply to declare, that under the circumstances of the case before the court, the defendants were not indorsers, but joint promisors: and, therefore, in two subsequent cases decided the following year, the case of *Palmer v. Grant* is not mentioned as contravening what was understood, by the court, to be the well-established doctrine in reference to these blank indorsements.

After such a long usage, and with so many uniform decisions of this court before us, we again confirm them; and, in the hope that this fruitful topic of professional disputation will be treated as one not open to discussion, we repeat, that, by the common law of Connecticut, a blank indorsement of a note not negotiable, *prima facie*, implies a contract on the part of the indorser, that the note is due and payable according to its tenor, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by the use of due diligence. "If" (as was said by a former chief justice of this court) "the maxim *stare decisis* is anything more than a name; if the people of this state have the privilege of certain rules of action, and are not the sport of perpetual vacillation and ruinous uncertainty, the law of Connecticut concerning indorsements of notes before expressed, is stable and unquestionable."

We improve the present occasion to repeat what this court has, in several cases, heretofore held as the obligation imposed on the holder of a note with such an indorsement, in order to subject the indorser.

As a general rule, he is required to pursue, with diligence, the proper legal measures for the recovery of the debt. This, however, is not required, if the maker, when the note comes to maturity, is insolvent, without property to pay it; and more than this, he may be obliged to perform, when he enters into a special contract to do more. If the maker is solvent, the

holder is bound, as soon as the note is due, to pray out a writ of attachment and deliver it to an officer whose duty it is to attach personal property sufficient to satisfy the damages which may be recovered in the suit, for which purpose, he is bound to make all reasonable search. He is not required to attach the real estate of the debtor, nor personal property, if, by diligent search, he can not find an amount of the latter sufficient to pay the damages; but if the debtor is possessed of other than real estate insufficient to pay the debt, or of real estate, it is the duty of the assignee to attach the body of the debtor, without any unreasonable delay, that thus payment of the debt may be coerced.

We have, thus far, confined our remarks to indorsements of notes not negotiable. In the present case, the note in suit is a negotiable note, indorsed in blank, by the defendant, a stranger to the note, for the benefit of the payee, and not indorsed by the latter. Does our law regard such an indorsement, as subject to the same legal construction, and as imposing upon the payee, the same legal diligence, as if the note were not negotiable? We think it does so regard it; and that, in Connecticut, the indorsement in blank of a negotiable note, by a third person, for the better security of the payee, *prima facie*, imports the same contract as the blank indorsement of a note not negotiable. Until the year 1811, promissory notes were not negotiable in this state according to the custom of merchants. In that year, a statute was enacted, making all promissory notes, duly executed, to the amount of thirty-five dollars, or more, for the payment of money only, and made payable to any person or persons, or his, or her, or their order, or to the bearer, assignable and negotiable according to the custom of merchants, and the law relating to inland bills of exchange. Since that time, numerous decisions have been made, in which it seems to have been assumed, by the court, as undoubted law, that these blank indorsements of the description mentioned, were subject to the operation of one uniform rule. Indeed, in some of the cases, the notes were negotiable, and the previously well-settled doctrine relating to indorsements of notes not negotiable, were applied to them. There can be, we think, no distinction properly made between them, in this particular: and we give our sanction to the doctrine stated by the late Chief Justice Hosmer, in the case of *Beckwith v. Angell*, 6 Conn. 323, 324 (although we differ from him on other points which arose in that case): "The law of Connecticut giving a

construction to indorsements in blank on promissory notes not negotiable, and on negotiable notes by one not a party to them, in order to warrant the maker's responsibility, has long been settled: and however the courts in the contiguous states, have differed from us in the construction of the contract implied in such indorsement, yet in one particular, there has been a universal harmony; and that is, in considering indorsements in blank, on notes not negotiable, and on negotiable notes when made not by a party, but to insure the maker's responsibility, as possessing the same legal effect. We adhere to the decisions establishing the legal principle thus stated, not only to preserve uniformity in our adjudications, but because we think it sound, reasonable, and just, and supported by the analogies of the law and the opinions of the respectable judicial tribunals of our sister states."

In view of the principles thus stated, we concur in the decision made by the judge, who presided at the trial of this cause at the circuit, that the note offered in evidence by the plaintiff, with the blank indorsement of the defendant, was not admissible in support of the count in the declaration, charging the defendant as a joint and several promisor of the note, nor, accompanied with the other evidence in support of that count, because the blank indorsement of itself does not imply the contract alleged in that count: nor does the evidence offered tend to prove such a contract as is alleged in the first count.

The record, however, states, that the plaintiff, in support of the second and third counts, offered the note, together with parol evidence tending to show, that the defendant, at the time of indorsing the note, did in fact assume, promise, and guarantee the payment of the note, in the manner set forth in the second and third counts; that such was the understanding of the parties; and that such an agreement having been actually made, it might lawfully be written over the blank indorsement. An objection was taken, by the defendant, to the parol testimony offered, on the ground that the legal import of the indorsement could not be varied by parol evidence. The court sustained the objection, and excluded the evidence.

In the rejection of this testimony, the judge, whatever may have been his own opinion, doubtless considered himself bound, by the latest adjudication at the circuit of which he had knowledge, and which was in accordance with the opinion he expressed. The point is, however, now before a full court; and we are at liberty and bound to dispose of it in conformity

to what we believe to be the legal principles and precedents applicable to it.

It has been urged, that a decision upon this point becomes unnecessary, inasmuch as the motion states, that "no evidence was offered by the plaintiff, that the defendant ever gave the plaintiff any authority to fill up the indorsement, other than what was implied from the indorsement itself;" that the parol testimony, which was rejected, was merely of conversations antecedent to the indorsement, which were merged in the written indorsement, and therefore properly rejected: or if such is not the fair construction of the motion, still, as no authority was proved to have been given, it is to be presumed the defendant did not intend to give, and did not in fact give any authority to vary the *prima facie* legal import of his indorsement; and in this view, the testimony was rightly rejected. We can not yield our assent to either view thus taken of the motion, by the defendant. It is to receive such a construction as the words, taken in their ordinary sense, and by fair interpretation, require. The motion expressly states, that the evidence offered was of an agreement actually made, by the defendant, at the time he indorsed the note, corresponding with the contract set up in the second and third counts. It was, then, an offer to prove what was the real contract between the parties; that it was not reduced to writing in form, but that in pursuance of it, and to carry it into effect, the defendant indorsed his name in blank on the note. By the expression in the motion, "no evidence was offered of any authority to fill up the indorsement," we understand, that no express authority was given to that effect, in words: but it would be a harsh and rigid construction of the motion, were we to assume, that the defendant refused to permit the indorsement to be so filled up, and that the plaintiff did not claim that the evidence offered, conduced to prove an implied authority to make the indorsement correspond with the contract it was designed to express. We think there is no reasonable doubt such was the precise offer of the plaintiff, and such the tendency of the evidence which he sought to present to the jury.

We are now prepared to consider the question whether this evidence should have been received. It is one of some importance, and as it is understood by us, that there have been conflicting decisions at the circuit, it is proper it should now be, if it has not heretofore been, definitely settled. The inquiry is, whether, as between the payee of a negotiable note and

a third person, who has indorsed it in blank, as a further security to the payee, it is competent for the payee to prove, by parol, the agreement which was in fact made, at the time of the indorsement, and the performance of which, the indorsement was intended to secure.

Two objections have been urged against the admission of this testimony. It is insisted, that it contravenes the legal import of the indorsement, which can not be varied by parol evidence; and that it is in opposition to the statute of frauds and perjuries.

1. The first objection assumes, that a blank indorsement, when intended as a warranty, necessarily and in all cases, imports a warranty of a particular character; that it is to be read and understood as though that precise contract was in writing over the signature of the indorser; and therefore, it can not be varied by oral evidence. This, we think, is neither more nor less than a *petitio principii*. It takes for granted the very point in issue, whether a blank indorsement is conclusive, or *prima facie* evidence only of the contract which was in fact made; and assuming it to be always conclusive, applies to it the well-established rule, that parol evidence is inadmissible to control, alter, or contradict a written agreement. In our opinion, such an indorsement is but *prima facie* evidence of the contract expressed by it. In the absence of all proof it is to be presumed to have been made with reference to its legal meaning. If no other agreement was in fact made, but such as the law will imply, from the indorsement itself, such indorsement ceases to be equivocal, and full effect is to be given to its legal signification.

The reason why, in such case, the evidence of the contract is to be derived from the indorsement, is, that it is a fair presumption the blank indorsement, when unattended with any different contract in fact, was intended by the parties to express their whole meaning. The law acts upon the reasonable supposition, that where both parties acquiesce in giving and receiving a blank indorsement merely, and make no other or different contract than such an indorsement implies, they are content to acquire no other rights, and be subject to no other liabilities, than the law implies from the signature of the indorser. The intention of the parties is thus ascertained and carried into effect. The agreement into which they have entered is enforced; their legal and equitable rights are protected; and the payee is precluded from availing himself of any

other contract than that which was made; and the indorser is secured by the performance of that agreement only to which he was a party. It is upon this ground alone, that the law, *prima facie*, implies any specific contract as resulting from a blank indorsement. While in blank, the signature, without the legal presumption, is without meaning. Some effect is to be given to it, if it creates any liability or confers any rights; and when there is no evidence of what was in fact intended by it, the law gives it a meaning: it declares what was the intention of the parties; and the indorser who signs in blank, knows, when he affixes his signature, which itself is to express the contract he has made, that, in legal contemplation, he has written over his name, just what the law presumes he intended to write. We do not, however, readily perceive, that the legal inference ought to preclude the parties from proving what the real contract was; or how the rights of either are invaded or sacrificed, by permitting the truth to be stated. The agreement actually made ought, in justice, to be enforced; and a rule of law framed for that purpose, and designed to carry into effect the intention of the parties, ought not to be perverted to thwart this intention and aid in the violation of this agreement; and yet, such will be the result of holding the presumption applied to a blank indorsement, to be a *presumptio juris et de jure*, which can not be rebutted. We should require the support of clear analogies and established precedents, before we yielded our assent to a doctrine so unjust and arbitrary, as the objection we are now considering advances.

The evidence offered did not contradict the agreement in writing. On the contrary, it ascertained, with precision, the contract into which the parties entered. It was to be used, to point the application to the subject-matter, and not to usurp the authority of the written indorsement. It is the latter which operates; the oral evidence does no more than assist the operation, by pointing out and connecting it with the proper subject-matter. It acts in aid and assistance of the indorsement, and performs that duty, which, on every application of a written instrument, must be accomplished, by means of extrinsic evidence—that is, it points out the precise object to which the instrument is applicable. A blank indorsement may be proved, by parol, to have been made merely for the purpose of collection. *Prima facie*, it purports to be a contract of warranty; but this presumption may be removed by oral proof that no such contract was in fact made. And if the evidence may be received,

for such purpose, it is difficult to perceive why it may not be introduced to show what was the agreement of the parties, which the indorsement was designed to denote. In both cases, it is offered for the same purpose—to give a different interpretation to the indorsement from that which it *prima facie* imports, by proof of the actual agreement which was made. For the same reason, it is competent, as between the immediate parties, to show, that a note indorsed in blank, was intended only as a renewal of a previous note. The indorsement is not controlled, by the oral testimony, but completed according to the manifest intention of the parties. The evidence is offered in conformity with the familiar rule, that the law does not imply a contract where an express one has been made. *Expressum facit, cessare tacitum*. Such evidence has been received in Great Britain, and in our sister states, almost without objection.

In *Smith v. Barber*, 1 Root, 207, the first question made was, whether parol evidence might be admitted to explain the blank indorsement and the intent of the parties therein? And the court say, the evidence is admissible; for a blank indorsement, until it is filled up, by the indorser, has no certain import; it may be for one purpose or another, or for none at all; and therefore, it may be explained by parol testimony. In *Brewster v. Dana*, Id. 267, it is said, by the court, a blank indorsement has no certain import until filled up with something written over it. In *Barker v. Prentiss*, 6 Mass. 430, the indorsement on the bill was regularly filled up, directing a payment to order; and it was objected that parol evidence ought not to have been admitted to control or explain the legal effect of the indorsement. Chief Justice Parsons, in giving the opinion of the court, says, this objection ought not to prevail; for although at common law, a written simple contract must be explained according to the true construction of the terms of it, and not by parol evidence, where there are no latent ambiguities, because the written terms of the contract are better evidence of its intent than any parol explanation; yet, he adds, parol evidence may be given to contradict a written simple contract, or to show that the whole of it was not reduced to writing, but that it was made with certain conditions or limitations, expressly agreed upon, but not contained in the written contract, when the action is between the original parties. Thus, it is every day's practice, notwithstanding a promissory note is expressed to be for value received, to admit the promisor, in an action by the promisee, to

prove there was no consideration. The same doctrine is advanced, by the court, in *Herrick v. Carman*, 10 Johns. 224. In *Badger v. Jones*, 12 Pick. 371, such evidence was received, and submitted to the jury.

We might refer to many other cases similar to those we have cited, but we deem it unnecessary. The principle which all of them declare and sustain, is, that as between the immediate parties, a blank indorsement is *prima facie* evidence only of the contract which they have made, and like all other such legal presumptions, may be explained by parol evidence; for it neither controls, alters, nor contradicts the written indorsement, but is entirely consistent with it.

2. A second objection is urged against the reception of the oral evidence, derived from the provisions of the statute of frauds. It is insisted, that a blank indorsement, when intended as a warranty, is a promise upon condition, to pay the debt of another, which, to be valid, must be in writing; and that the testimony offered, was an attempt to prove on the defendant, an agreement, by parol, to pay another's debt, and falls precisely within the words and spirit of the statute. We think this ought not to prevail. It has no foundation in principle; nor is it supported by any precedent, to which we have been referred, or have been able to find. On the contrary, it has been repeatedly repudiated. The indorsement, being in writing, and in blank, is, of itself, an authority to write over it, the agreement it was designed to express: "Proof of the name, is proof of the indorsement." There is a memorandum of the contract, signed by the party to be charged by it; or rather, the contract itself is so signed. We do not perceive, if the present objection should be sustained, but that in every case of a blank indorsement, the statute of frauds and perjuries would be an insuperable bar to the admission of parol evidence to prove a limited contract. Indeed, it must have the effect to exclude all such evidence, even when the indorsements are in full: and yet, we all know it is every day's practice to receive oral testimony to prove an indorsement in full, to have been intended between the parties, only to facilitate its collection, or as a substitution of the note so indorsed, by way of renewal of a previous note. The statute was never intended to apply to cases of this description. We believe it has never been so applied. In *Barker v. Prentiss*, 6 Mass. 430, the court say, neither a bill of exchange on its face, nor the indorsements, are within the statute of frauds. In *Ulen v. Kuttredge*, 7 Id. 233, it is said, by the court,

that the defendant's signature upon the back of the note, which was an indorsement in blank, with the authority given by him to the witness, pursuant to the authority, may be considered as a memorandum signed by the party, within the intent of the statute (of frauds), as fully as if it had been written in the defendant's presence, immediately after the signature. And parol evidence was as well admissible to prove this authority, as it is in any case upon a promise in writing, to prove the handwriting of the party making the promise. In *Moies v. Bird*, 11 Id. 436 [6 Am. Dec. 179], this objection was made and overruled. In *Nelson v. Dubois*, 13 Johns. 175, the judgment of the court below was reversed, because parol evidence of the agreement accompanying the blank indorsement, was rejected, as within the statute of frauds. In *Turnbull et al. v. Trout*, 1 Hall, 336, the objection growing out of the statute was fully examined by the court, and considered untenable.

It is, however, urged, that whatever may have been the decisions in Great Britain, or elsewhere, we have, in Connecticut, a law of our own, different from what prevails there; that by usage, as well as by judicial decisions, we have changed the common law, and established a different rule; and that, in this state, a blank indorsement has a fixed, definite legal meaning and import, which no extrinsic agreement of the parties can vary, and which precludes the insertion of any special contract repugnant to the legal nature of such an indorsement. We are not aware, that any such usage has ever prevailed in this state; nor have we been referred to any decisions, which, it is said, have effected such an important change in the rules of the common law. Some extrajudicial opinions, foreign to the points adjudicated in the cases where they are found, have not escaped our notice. They may be seen in *Huntington v. Harvey*, 4 Conn. 129; *Palmer v. Grant*, Id. 399; *Wellon v. Scott*, Id. 532. Our researches have not enabled us to discover a single case, in which this court have advanced the doctrine for which the defendant contends. So far from this, we think the usage in relation to this subject, has been the very reverse of what is now claimed. As early as 1823, this court, upon full deliberation, did decide, that a blank indorsement of a negotiable note, made by a third person, with a view and in pursuance of an agreement to guarantee the payment of the note to the payee, might be filled up with the agreement so made; that parol proof of the special agreement was admissible, not being in contravention of the provisions of the statute of frauds, nor opposed to the rule

of the common law, that a written instrument can not be controlled, altered, nor contradicted, by parol testimony. Since that decision, we had hoped the law in relation to the admissibility of such evidence, would be considered, by the profession and the public, as finally settled. If we thought the doctrine established by that case, questionable on principle (which we do not), we should yield to its authority, and adhere to it, as having declared a rule, by which the rights and duties of parties in the condition of those now before the court, and in respect to the point now under consideration, have been defined. If there has been, heretofore, a diversity of opinion regarding the competency of this proof, we indulge the hope, that henceforth the question will be considered at rest.

A reference to our own reports, and the commentators on our law, is all which we deem necessary to add. Chief Justice Swift, in his *System*, published 1796, p. 159, says, the courts have determined, that parol evidence may be admitted to explain the meaning of a blank indorsement; for until it is filled up, by the indorsee, it has no certain import. In his treatise on bills of exchange, 342, 343, he says, in the case of an indorsement in blank, before it is filled up, and while it remains in the hands of the first assignee, the assignee will be at liberty to show, by parol proof, that at the time of indorsing the note, there was an agreement between the parties, that he should not warrant the note, and that the assignee should take it at his own risk, or that it was indorsed and delivered to the assignee as agent of the assignor, to collect and account for it to him. In his digest, 434, he observes, while the indorsement remains in blank, and in the hands of the first assignee, it is admissible for the assignor to show any special agreement between him and the assignee, made at the time of the assignment; as that there should be no warranty, or that it was delivered to the assignee as an attorney to collect. These principles are supported, by the two cases before mentioned: *Smith v. Barber*, 1 Root, 207; *Brewster v. Dana*, Id. 267. The case of *Beckwith v. Angell*, decided by this court (6 Conn. 315), fully sustains the same doctrine. It was suggested, that one of the judges in that case, observed, that it might, with propriety, be decided as arising under the law of Rhode Island, where the indorsement was made, and not with reference to the law of this state: but it is to be remarked, that the same judge said, in his opinion, the peculiar meaning, which, in this state, has been attached to blank indorsements of promissory notes not

negotiable, might be varied, by proof of a positive contract, made at the time when the note was indorsed.

Some minor objections were made to the admission of the evidence which was offered, founded on supposed variances between the proof and the allegations in the different counts comprising the declaration. We do not consider it necessary to make any other answer to them, than that they have not been overlooked by us, and that we do not think they can be sustained on principle; nor have they been supported by authority.

Upon the whole, we are of opinion, that the court below should have received the testimony, which was offered in support of the second and third counts of the declaration; and in consequence of its rejection, a new trial is advised.

The other judges concurred in this opinion.

New trial to be granted.

INDORSEMENT IN BLANK, OF A PROMISSORY NOTE BY A PERSON OTHER THAN THE PAYEE OR HOLDER.—The indorsement of a negotiable instrument in blank, is the designation applied to the act of a person who writes his name upon the back thereof, with the intent to incur the liability of a party who warrants the payment of the instrument, provided it is presented to the principal at maturity, and if not paid by him, notice of that fact is duly given to the indorser: Dan. on Neg. Inst., sec. 667. It is not necessary, however, that the indorsement should be upon the back of the note; it is sufficient if made upon the face, or on another paper annexed thereto: Story on Prom. Notes, sec. 121; *Folger v. Chase*, 18 Pick. 63. In modern times much litigation has been had concerning the legal effect of an indorsement in blank upon a promissory note payable to order by a person that, at the time of the indorsement, is not the payee or holder. The effect given to such a contract, has been widely different. In Connecticut, the rule adopted in the principal case has ever since remained the law of that state: *Laftin v. Pomeroy*, 11 Conn. 440; *Castle v. Candee*, 16 Id. 223; *Ranson v. Sherwood*, 26 Id. 437; *Holbrook v. Grove Camp*, 38 Id. 23; *Gillespie v. Wheeler*, 46 Id. 410, all citing the principal case. As stated in *Perkins v. Catlin*, and some of the subsequent cases in that state, the legal import of such an indorsement, is: 1. That the note is due and payable; 2. That the maker shall be of ability to pay it when due; and 3. That by the use of due diligence it will then be collectible. As to what constitutes due diligence, see *Clayton v. Coburn*, 42 Id. 348.

In Alabama and California such an indorsement, whether considered strictly as an indorsement or guaranty, imposes the same liability as a regular indorsement: *Milton v. De Yampert*, 3 Ala. 648; *Price v. Lavender*, 38 Id. 389; *Riggs v. Waldo*, 2 Cal. 485; *Pierce v. Kennedy*, 5 Id. 138; *Jones v. Goodwin*, 39 Id. 495. In *Riggs v. Waldo*, the question was as to the nature of the liability of one who, not being a party to a note, indorses his name in blank before delivery, and it was held, that "his undertaking is attended with all the rights of an indorser *stricti juris*." This doctrine was reiterated in *Jones v. Goodwin*, 39 Id. 495, and stated to be the most reasonable and just.

So in New York the liability of a stranger who signs his name in blank on the back of a negotiable instrument, is that of an indorser. Where the note is payable to order, the payee must be the first indorser, and when indorsed in blank by a third person before it is indorsed by the payee, the law implies that the latter intended to assume the liability of a subsequent indorser. He is under no liability to the payee, nor to any one to whom the note is transferred with notice of the facts, and if he pay the note, he may have recourse to the payee as the first indorser: *Herrick v. Carman*, 10 Johns. 224; 12 I.L. 159; *Tillman v. Wheeler*, 17 Id. 325; *Bacon v. Burnham*, 37 N. Y. 614; *Phelps v. Vischer*, 50 Id. 69. If such subsequent indorser intended, however, by his contract, to become security from the maker to the payee, then the latter may, for the purpose of giving effect to such intention, indorse the note without recourse, or he may show that no liability was to result from his indorsement. Such intention may be shown by parol, and may be inferred from the circumstances under which the indorsement was made: *Moore v. Cross*, 19 Id. 227; *Clothier v. Adriance*, 51 Id. 322; *Hull v. Marvin*, 2 Thomp. & C. 420; S. C. affirmed, 59 N. Y. 652. A similar rule prevails in Pennsylvania: *Taylor v. McCune*, 10 Pa. St. 460; *Slack v. Kirk*, 67 Id. 380; in Oregon, *Kamm v. Holland*, 2 Or. 59; in Tennessee, *Comparree v. Brockway*, 11 Humph. 355; in Wisconsin, *Cady v. Shepard*, 12 Wis. 639; and in Georgia, *Collins v. Everett*, 4 Ga. 266.

In Massachusetts it was early held that a person who placed his signature on the back of a promissory note when it first took effect, or subsequently, in pursuance of a previous arrangement, became jointly and severally liable with the maker who had signed on the face of the note, as an original promisor: *Moies v. Bird*, 11 Mass. 436; 6 Am. Dec. 179. Such is now the law of that state: *Union Bank v. Willis*, 8 Metc. 504; *Riley v. Gerrish*, 9 Cush. 104; *Hawkes v. Phillips*, 7 Gray, 284; *Pemberton Bank v. Longee*, 108 Mass. 371. Where, however, the indorsement is made after the note has taken effect, and under a subsequent arrangement, the contract is considered a guaranty: *Tenney v. Prince*, 4 Pick. 385; *Mcconey v. Stanley*, 8 Cush. 85; *Nelson v. Harrington*, 16 Gray, 139; *Green v. Shepherd*, 5 Allen, 589. If it was not intended that the note should take effect in the hands of the payee, and prior to its delivery, the latter indorsed it in blank above the signature of the person that had previously placed his name on the back, the contract of the latter would be that of an indorser: *Pierce v. Mann*, 17 Pick. 244; *Clapp v. Rice*, 13 Gray, 403. So if a note is indorsed by a person after it has been indorsed by the payee, his liability is that of an indorser, and it can not be shown by parol that a different liability was intended: *Howe v. Merrill*, 5 Cush. 80; *Prescott Bank v. Caverly*, 7 Gray, 217; *Wright v. Morse*, 9 Id. 337; *Essex Company v. Edmonds*, 12 Id. 273; *Bigelow v. Colton*, 13 Id. 309. The time that the signature on the back was made may be shown by parol: *Brown v. Butler*, 99 Mass. 179; *Way v. Butterworth*, 108 Id. 509; but in the absence of such proof the presumption is that the signature of the stranger on the back of the note was made at the same time as the note: *Union Bank v. Willis*, 8 Metc. 504; *Benthall v. Judkins*, 13 Id. 265; *Way v. Butterworth*, 108 Mass. 509.

The rule as adopted in Massachusetts has been followed in whole or in part in the following states: In Arkansas, *Killian v. Ashley*, 24 Ark. 511; Delaware, *Massey v. Turner*, 2 Houst. 79; Maine, *Colburn v. Averill*, 30 Me. 310; Irish v. Cutter, 31 Id. 536; *Childs v. Wyman*, 44 I.L. 433; *Sturtevant v. Randall*, 53 Id. 149; Maryland, *Ives v. Bosley*, 35 Md. 262; *Wutz v. Aback*, 37 Id. 404; Michigan, *Rothschild v. Griz*, 31 Mich. 150; see this case for an extensive citation of the authorities upon this question; Minnesota, *Peckham v*

Gilman, 7 Minn. 446; *Rey v. Simpson*, 22 How. (U. S.) 341, in error to the supreme court of Minnesota; *Missouri, Powell v. Thomas*, 7 Mo. 440; *Stagg v. Linfeller*, 59 Id. 336; *Chaffe v. M. and N. W. R. R. Co.*, 64 Id. 193; *Rhode Island, Perkins v. Barstow*, 6 R. I. 505; *South Carolina, Baker v. Scott*, 5 Rich. 305; *Carpenter v. Oaks*, 10 Id. 17; *Texas, Cook v. Southwick*, 9 Tex. 615.

In Indiana, when a person signs a negotiable instrument upon the back, the presumption is that he assumes the liability of an indorser; but it may be shown by parol that he intended to be liable as a maker: *Sill v. Leslie*, 16 Ind. 236; *Snyder v. Oatman*, 16 Id. 265; *Dale v. Miffitt*, 22 Id. 113; *Bunson v. Alexander*, 48 Id. 244; but where the payee indorses at the same time, parol evidence is not admissible to show that a different contract from that of an indorser was intended by the other: *Vore v. Hurst*, 13 Id. 551; *Roberts v. Masters*, 40 Id. 461.

In New Jersey, the mere signature of a third person on the back of a negotiable note before its indorsement by the payee creates *per se* no implied or commercial contract whatever. The liability of such third person will be that of a second indorser, or of surety for the maker, according to the intention with which he became a party to the note, and parol evidence is competent for the purpose of showing what such intention was: *Crozer v. Chambers*, 20 N. J. L. 256; *Chadlock v. Vanness*, 35 Id. 517. This rule also prevails in Iowa and Mississippi: *Fear v. Dunlap*, 1 G. Greene, 331; *Thomas v. Jennings*, 5 Smed. & M. 627; 13 Id. 617. In Ohio, independent of proof, the law presumes that a stranger who indorses a note in blank, intends to guarantee its payment; but evidence is admissible to show a different intention, and when it appears that he signed it when the note took effect, he is liable as a co-maker: *Seymour v. Mickey*, 15 Ohio St. 515. See *Greenough v. Smead*, 3 Id. 145.

A somewhat similar rule prevails in Kansas, where the indorsement of the stranger is prior to that of the payee: *Firman v. Blood*, 2 Kan. 496; *Fuller v. Scott*, 8 Id. 25; but when indorsed at the same time, or after the payee has indorsed it, the liability is that of an indorser: *Bradford v. Pauly*, 18 Id. 216. The contract implied from such an indorsement in Illinois is a guaranty, if indorsed before the note is negotiated, and, if afterwards, a contract of indorsement. The contract intended may be shown by parol, but independent of proof, the signature is presumed to have been placed there at the making of the note: *Klein v. Currier*, 14 Ill. 237; *Webster v. Cobb*, 17 Id. 459; *White v. Weaver*, 41 Id. 409. A further examination of this subject will be found in the note to *Finchugh v. Love's Ex'r*, 3 Am. Dec. 570, where the rule adopted in the United States courts is considered, and the elaborate opinion of Clifford, J., in *Good v. Martin*, 5 Otto, 90, is quoted at length.

PAROL EVIDENCE TO VARY EFFECT OF INDORSEMENT IN BLANK.—In the note to *Hill v. Ely*, 9 Am. Dec. 376, 381, this subject was considered, and the authorities reviewed. See also, *Daniel v. McRae*, 11 Id. 787 and note; *Miser v. Robinson*, 12 Id. 694; *Fuller v. McDonald*, 23 Id. 499.

BENEDIOT ET AL. v. GAYLORD.

[11 CONNECTICUT, 332.]

LEAST CERTAINTY IN DESCRIPTION in deed must yield to greater certainty.

DESCRIPTION OF LANDS AS BEING BOUNDED BY CERTAIN SPECIFIED PROPRIETORS must yield to another description in the same deed by known, visible, permanent, and well-ascertained monuments, and courses and distances, because the latter description is more certain than the former.

PAROL EVIDENCE NOT ADMISSIBLE to control the legal effect of a deed, nor to show that a description which the law will disregard ought to prevail.

EJECTMENT for about twenty-four acres in Norfolk. Plaintiffs in July, 1829, owned a tract of land called pitches Nos. 1 and 2, and west part of pitches Nos. 3 and 4, Samuel Cowles then owning the eastern part of the last-named pitches. The plaintiffs executed deeds to the defendants of lands, "situated towards the south-easterly part of the town of Norfolk, and southerly or south-westerly of the Greenwoods turnpike, beginning at the north-west corner of the same, at a stump and stones, and running east one half degree north, fourteen rods, to heap of stones on blue rock; then north one half degree west, one rod, to heap of stones by highway; then east eighteen degrees south, forty-four rods, to heap of stones by a beach, near a spring; then east eighteen degrees south, fifty-eight rods, to beach and stones; then south fifteen degrees west, one hundred rods, to stake and stones; then west eighteen degrees north, fifty-eight rods, to a heap of stones; then west fifteen degrees north, fifty-four rods, to a couple of maples in the branch; then to the first bounds; containing sixty-eight acres, two roods, and thirty-two rods, be the same more or less; bounded north on Elon Maltbie's land and Wilcox Phelps' land; east on Samuel Cowles; south on James Humphrey, and Pliny Foot, and Moses Grant; west on E. Maltbie." Pitches Nos. 1 and 2 contained sixty-nine acres and one hundred and eight rods of land. If the monuments and courses and distances were followed, the deeds would include pitches Nos. 1 and 2 only; but if the boundaries by adjoining proprietors prevailed, the deeds must be held, in addition to pitches 1 and 2, to convey the premises in controversy, viz., all of pitches 3 and 4 west of the lands of Samuel Cowles. The defendants insisted that the description by adjacent proprietors ought to prevail, and they offered some parol evidence tending to show that this was the intention of the grantors in the deed. This evidence was excluded on objection of plaintiffs. The judge charged that the description by courses, distances, and fixed monuments, was the more certain and must be followed. Verdict for plaintiffs. Defendant moved for a new trial.

L. Church, for the motion.

T. Smith, against the motion.

CHURCH, J. Without going into so minute a detail of facts and description as is contained in this motion for a new

trial, it will be sufficient, as to the first question suggested, to state, that it was agreed, on the trial, that the operation of the deeds of conveyance from Benedict and others, was, to convey to the defendant pitches Nos. 1 and 2, and which, in said deeds, were described by fixed, well-ascertained, and visible metes and bounds, as well as by corresponding courses and distances. And the plaintiffs claimed, that no other land was conveyed, by the deeds in question.

The defendant is in possession of the demanded premises, consisting of twenty-one acres and forty-seven rods more of land, in addition to said pitches Nos. 1 and 2, claiming title under the same deeds, and under the last language of description, as land bounded on its several sides, by the adjoining proprietors named in said deeds, while he agrees, that this is excluded, by the first description, that of metes and bounds, etc.

It is apparent, from an inspection of these deeds, that the parties did not intend, by different descriptions of the granted premises, to convey different and additional parcels of land, but intended to describe the same land. The question is, which description shall control? The case of *Belden v. Seymour*, 8 Conn. 19 [21 Am. Dec. 661], recognizes the well-established and governing principle, in cases of this character; but whether the principle was correctly applied, in that case, is not equally obvious. The principle is, that the least certainty of description in deeds must yield to the greater certainty, unless the apparently conflicting descriptions can be reconciled: *Preston's Heirs v. Bowmar*, 6 Wheat. 580; *Milling v. Crankfield*, 1 McCord, 258, 261; 4 Kent Com. 555; *Pernam v. Wead*, 6 Mass. 131; *Doe d. Humphreys v. Roberts*, 5 Barn. & Ald. 407; 7 Serg. & Lowb. 150. No effect can be given to, and no extension can be made of, the first description by metes and bounds, so as to include the twenty-one acres and forty-seven rods of land claimed by the defendant under the second description. And it is equally certain that no effect can be given to the second description, without controlling the first.

The first description given of the land intended to be conveyed, is as certain as it well can be: known, visible, and well-ascertained monuments, the most important of which are natural and permanent, are referred to and described. These correspond, with all reasonable precision, with the courses and distances given, and ascertained by actual survey; and as confirmatory of the whole, the quantity of land expressed is found to be correct. It was insisted in argument by the defendant,

that the second or additional description was of equal certainty. But this is obviously unfounded. The limits of another's land referred to generally, without particularity of description, or known and certain boundaries, are descriptions of great uncertainty, and can only be rendered certain, by investigation and survey. The charge of the judge at the trial, is clearly supported by principle, as applicable to the facts in the case.

But the defendant insists, notwithstanding, that parol evidence should have been admitted, for the purpose of proving, that the parties to these deeds intended to convey the tract of twenty-one acres and forty-seven rods, and supposed it was embraced in the first and particular description. If the two descriptions in these deeds had been equally certain, as the defendant claimed, it might have been contended, that a latent ambiguity existed, which might be explained, by parol; but we have already seen that this is not true. Nor was parol evidence necessary to give effect to the deeds, and save them from entire failure; nor to show whether the demanded premises were parcel or not of the premises conveyed. If such had been the object of the evidence offered, the authorities cited by the defendant are very conclusive to prove it admissible.

But on the contrary, the only effect of the parol evidence offered, was, to control the legal construction and effect of the deeds, in manifest violation of well-settled principles of the law: 1 Ph. Ev. 412; 3 Stark. Ev. 1026; *Doe d. Freeland v. Burt*, 1 T. R. 701; *Radford v. Southern*, 1 Mau. & Sel. 299; *Doolittle et ux. v. Blakesley*, 4 Day, 265 [4 Am. Dec. 218]; 1 Swift Dig. 122.

A new trial ought not to be granted.

The other judges concurred in this opinion.

New trial not to be granted.

Cited and approved in *Roberti v. Atwater*, 42 Conn. 269, upon the point that parol evidence is inadmissible to control the legal construction and effect of a deed.

BOUNDARIES in a deed are to control in ascertaining the land conveyed: *Bradford v. Hill*, 1 Am. Dec. 546; *Hove v. Bass*, 3 Id. 59; *Dale v. Smith*, 12 Id. 64. A statement of the quantity of land supposed to be conveyed, when inserted by way of description only, must yield to descriptions by monuments and metes and bounds: *Dale v. Smith*, Id. 70, note.

BRUSH ET AL. v. SCRIBNER.

[11 CONNECTICUT, 388.]

WHERE A NEGOTIABLE NOTE IS INDORSED in blank and delivered to a person who has no interest in it, to have it discounted, and he indorses it, before maturity, to a third person, without notice, in satisfaction of his own private debt, such person is a *bona fide* holder, and is unaffected by the equities of the previous parties.

WHERE, IN AN ACTION upon a contract, the decision is in accordance with the laws of this state, a new trial will not be granted, to give the unsuccessful party the benefit of the law of another state, not particularly insisted on at the trial, though the contract was made and the parties resided in that state.

Action commenced by Brush and Cook, partners, against John Scribner, on an indorsement on a promissory note made in New York, by Abraham S. Scribner, of that city, for three hundred and twenty-six dollars and fifty cents, payable to the order of defendant, and by him indorsed in blank. The defendant claimed that the note was to have been discounted at the Fairfield county bank, for the maker's benefit, and that for that purpose it was delivered to E. B. Stevens, who had no interest in it whatever; and that he fraudulently negotiated it, without the knowledge of the parties. Plaintiffs claimed that on January 3, 1834, Stevens, being indebted to them in the sum of one hundred and twelve dollars and eighty-five cents, delivered the note sued on to them in payment, and received from them the balance in cash and in goods. It was admitted that plaintiffs had acted fairly, and without knowledge of the circumstances which the defendant claimed to exist; and that the maker, or defendant, had paid plaintiffs what was due upon the note, except the one hundred and twelve dollars and eighty-five cents. The court instructed the jury, that if the note was delivered to the plaintiffs, and by them received as collateral security only for a previous indebtedness; or if it was only to be applied in payment thereof when collected, this would not constitute such a valuable consideration as would entitle the plaintiffs to recover. But if the note was delivered for the sole use and benefit of Stevens; or if it was delivered by Stevens to the plaintiffs, and by them received as a satisfaction and extinction of said previous indebtedness, the plaintiffs were entitled to recover. Verdict for plaintiffs. Defendant moved for a new trial for misdirection.

Sherman and Betts, for the motion.

Hawley and Booth, contra.

WILLIAMS, C. J. The defendant claims, that as to the one hundred and twelve dollars and eighty-five cents, the antecedent debt, there was not such a consideration as would entitle the plaintiffs to a recovery; or at least, that such is the law of the state of New York, which ought to govern the contract under which the plaintiffs claimed. That want of consideration, as between the parties to negotiable paper, may be shown, is well settled; and the same rule exists, where such paper comes into the hands of a third person, who was apprised of that fact. So when negotiable paper is made for a particular object, as when it is indorsed for a specific purpose, the indorser lending his name to accommodate the maker, as to renew another note, and the maker applies it to a different purpose, to the prejudice of the indorser, and this is known to the person receiving it, he shall stand upon no better ground than the fraudulent assignor. But if the assignment of such note or bill is a fraud upon the indorser, yet a *bona fide* holder for a valuable consideration, without notice, to whom such note or bill has been transferred, will be protected in receiving such paper, in the usual course of business.

It was long since decided, that when a bank note payable to A. or bearer, was lost, and found by a stranger, and by him transferred to C., for a valuable consideration, A. might have trover against the stranger, for he had no title to it, but not against C., by reason of the course of trade, which creates a property in the assignee or bearer: 1 Salk. 126. So where an innkeeper received a bank note from his guest, in the course of his business, and paid the balance, he was permitted to retain it, although the note had been stolen from the mail; because he had received it fairly and honestly, in the usual course of business. It shall never be followed, says Lord Mansfield, into the hands of the person who took it *bona fide*, in the course of currency, and in the way of his business: *Miller v. Race*, 1 Burr. 462. And where a bill or draft was drawn payable to the ship Fortune, or bearer, and it was lost, and paid by the finder for tea to the plaintiff, he paying the difference between the price of the tea and the draft in cash, fairly and *bona fide*, it was held, that there was no distinction between that and a bank note. And Wilmot, J., said: "Having been taken fairly and *bona fide*, in the course of trade, and being negotiable, the plaintiff was entitled to recover:" *Grant v. Vaughan*, 3 Id. 1516. And where a bill, drawn by the defendant, payable to W. or order, and indorsed in blank, by the

payee, was stolen and passed for goods, Lord Mansfield, in giving judgment, says, the law is settled, that a holder coming fairly by a bill or note, has nothing to do with the transactions between the original parties, unless in the single case of a note for money won at play. I see no difference, says he, between a note indorsed in blank and one payable to bearer: they both go by delivery, and possession proves property in both cases. It was received in the course of trade; therefore the case is clear: *Peacock v. Rhodes*, Doug. 633.

Thus stands the law, as settled by Lord Mansfield. Bank notes, bills of exchange, promissory notes payable to bearer, or to order when indorsed in blank, are all placed upon the same footing, and for the same reason; because these principles alone would secure their free circulation. The *bona fide* holder of such instruments, having received them for a valuable consideration, in the usual course of business, must be protected against the claims of the original owner, by whose misfortune or negligence, one or two innocent parties must suffer. As between the former owner, who has been robbed, and a subsequent *bona fide* holder for value, it is certainly a case of great hardship: it has, however, been settled, by eminent judges, upon principles similar to those which validate sales of stolen goods in market overt, or the circulation of coin, and has been acquiesced in. The liability of parties to a bill of exchange or promissory note has been fixed, says McLean, J., on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and can not be departed from: *Bank of U. S. v. Dunn*, 6 Pet. 59.

But as it respects cases of this kind, where one person has confided his name on a note or bill to a servant or a friend, and thus enabled him to appear to the world as owner, and as having a lawful right to dispose of it, if that confidence is misplaced, the principles of equity, as well as of commercial law, require, that he who has thus put it into the power of another to defraud should himself sustain the loss, rather than the person who has given credit to these appearances. It is not perceived how the case differs, in principle, from that of a man who gives his name in blank to another to fill up a note over it for a certain sum, and his agent exceeds that sum; or where he authorizes a clerk to use his name in all his business, and the clerk uses it for his own purposes. In the opinion of eminent judges, those who issue accommodation paper are not entitled

to special favor, as it respects third persons. In *Kerrison v. Cooke*, 3 Camp. 362, Gibbs, J., says, he is sorry the term accommodation bill ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract, by putting their names to negotiable securities: and in *Fentum v. Pocock*, 5 Taunt. 192, 197, Heath, J., says, courts have gone much too far in lending support to these mischievous instruments, the evils resulting from which we see every day. And the principle applies as well to the indorser as the maker: each gives the credit of his name to the instrument; and the one contributes, as far as his name is concerned, as much as the other, to deceive the public as to the rights of the holder; and the indorser constitutes the holder his attorney to the extent of such note or bill.

In the case before the court, it is not denied that the plaintiffs received this note in the course of business, fairly and *bona fide*, and without any grounds for suspicion; nor is it denied that a valuable consideration was paid, so far as cash or goods were paid at the time. But as to that part of it which went to satisfy an antecedent debt, it is said that it was not a valuable consideration. That the satisfaction and extinction of a pre-existing debt, is, in the common acceptance of the term, a valuable consideration, can not be doubted. It is said, however, not to be the valuable consideration spoken of in the cases cited; as in all those cases there was a present consideration.

It is true, that in those cases the paper was not taken for prior debts; but no reliance is placed upon that circumstance; and the rule is laid down in broad and general terms, as if intending to embrace all cases of negotiable paper, received fairly in the course of business, for a valuable consideration given. When this term was used, the court certainly knew its legal effect, as well as its ordinary acceptance; and had they intended to have used it in a limited sense, it would have appeared in some of these cases. Besides, the great object of the rule was, to aid in the circulation of the negotiable paper, by the security it gave to a *bona fide* holder from being involved in the conflicts which might arise between the original parties. But, if all those who receive this paper for antecedent debts, are to be excluded from the benefit of this rule, it must greatly limit its operation. Had such been the practical construction, this distinction must have been well known and understood in the community; and it is difficult to believe, that a term so general as that of valuable consideration, would have been so often used

by such men as Lord Mansfield and Wilmot, J., when they meant to apply it only to a part, perhaps a small part, of those cases where a valuable consideration was paid. On a subject of such general interest to the commercial world as a free circulation of negotiable paper, it is believed no new distinction could have been intended to be introduced; but that a general principle was designed to be established, in making such paper as free in its circulation as the coin it represented. But that paper which can not be safely taken in payment of debts, can not be said to have a free circulation; and thus the great object of the rule would be defeated. It is true, that notes given upon usurious or gambling considerations form a class excepted from the rule. This, however, is founded upon statute regulations, and is said to be a hard case.

It is also apparent, that the more exceptions are introduced, the more embarrassments will exist in the circulation of such paper; and the injury to the circulation of bills and notes must be nearly as great, if they can not be safely passed in payment of antecedent debts, as if it should be said, they should not be passed for goods sold. When we consider the sums annually paid for debts due at the custom-houses, the state treasury, the school fund, the various banking institutions in the state, in addition to the payments upon individual debts, it is apparent that the restriction now proposed to be introduced, must, if adopted, have a great and alarming effect upon the circulation of negotiable paper. Before this court lend their aid to such an event, they must be clearly satisfied that the law requires it.

How, then, stand the authorities? In the argument at the bar, not a case has been cited from the English books, or from our own, in support of the claim made by the defendant. It seems to the court, that after the general expressions used by the judges, who decided the cases above cited, those who claim that the term valuable consideration was used in a limited sense, are bound to show it. This they have not done. The court are not informed of any case, within nearly half a century after the decision, in which such a distinction is taken. In the case of *Smith v. De Witts*, 6 Dow. & Ry. 120; Serg. & Lowb. 256, Abbott, C. J., did, at *nisi prius*, say, that it would have made a difference whether the goods were sold upon the credit of the bill, or sold originally upon the personal credit of the person who put off the bill.

In that case, the defendant, the acceptor of the bill, had placed it in the hands of one Crozar, to procure it discounted,

and to deliver to him the avails. Crozar, having committed an act of bankruptcy, fled to France, and the plaintiff followed him to procure payment for goods sold him, and received from him, at Paris, various securities, and amongst them this bill. On motion for a new trial, Chief Justice Abbott says: "If the bill had been accepted for value, the plaintiff could not have recovered upon it; because Crozar being a bankrupt, it would have passed to his assignees." He adds: "Can it be said that this bill, which is of no value, inasmuch as it passed from the defendant without consideration and he being unlawfully deprived of it, the plaintiff has a right to sue upon it, and place himself in a better situation than the man from whom he received it? It appears to me, that it would be contrary to the first principles of natural justice to say that the plaintiff is a *bona fide* holder for value." Holroyd, J., says: "I agree, that if this bill had been delivered to a *bona fide* holder for valuable consideration, and a person ignorant of the circumstances under which it had been obtained from Crozar, he might sue the acceptor, notwithstanding any want of consideration received by him. But the argument goes a great deal farther: for it assumes, that Crozar was not a bankrupt at the time the plaintiff received the bill. Now, at that time, Crozar, assuming that he had possessed himself of the bill rightfully, had no authority to transfer a right to the plaintiff, by an indorsement. The plaintiff can not be in a better situation than the person from whom he derived title. Assuming that the assignees might have recovered it, it is clear that the plaintiff had no title, because at the time the property in the bill, if Crozar had any, vested in the assignee." Littledale, J., concurred.

Now, although there are expressions in the opinion of Abbott, C. J., which favor the defendant's position; yet when the case could be, and was, by him and his brethren, decided upon another ground, that this Crozar could not pay debts and transfer securities, after an act of bankruptcy, it is hardly to be supposed, that the chief justice meant to rely upon that as the ground of decision, which was so novel and so unnecessary. If he did, he does not seem to have received the countenance of his brethren; nor do we find this case cited, in after cases, in support of that opinion. It may be proper also to remark, that Abbott, C. J., speaks of his not being a *bona fide* holder for value; and that upon that subject, his notions were peculiar; that he required a degree of vigilance, on the part of the person who received a note or bill which was as novel as embar-

raising: *Gill v. Cubitt*, 9 Barn. & Cress. 466;¹ 10 Serg. & Lowb. 154, and which has in effect been recently overruled; *Crook v. Jadis*, 5 Barn. & Adol. 909; *Backhouse v. Harrison*, Id. 1098; 27 Serg. & Lowb. 234, 276.

The case of *De La Chamill v Bank of England* has been supposed to recognize the same distinction: Chit. on Bills, 91 (ed. 1836). The action was trover for a bank note, which was detained as having been stolen from one H. The note was received by the plaintiff from the house of Odier & Co., Paris. The course of business was, for the plaintiff, who resided in London, to remit to Odier & Co. in Paris, and Odier & Co. to him, and thus take advantage of the exchange, and divide the profits at the end of the year; each party to be answerable for the paper transmitted to the other. The defendant's counsel contended, that although Odier & Co. were indebted to the plaintiff, at the time this note was remitted, yet as they had not given him any further credit, on the faith of the note before notice, he must be considered as their agent, etc. Lord Tenterden held, that he must be considered identified with Odier & Co.; and if they could not recover, the plaintiff could not. And upon the motion for a new trial, the same learned judge remarks: "We think the plaintiff stands in the same situation as Odier & Co., who sent the note to him. They were mutually agents for each other. Then he goes on and states the balance due the plaintiff, but states that he did not give Odier & Co. any further credit, than if the note had not been transmitted." In this case, instead of placing the decision upon the broad ground that prior indebtedness was not a valuable consideration, which would have at once disposed of the case, the court take the ground, that the plaintiff was the agent of Odier & Co., and must stand or fall with them. This case, therefore, impliedly admits, that a prior indebtedness, under other circumstances, might have been a sufficient consideration.

But there are other cases, bearing more directly upon this question. In *Collins v. Martin*, 1 Bos. & Pul. 648, 546, the plaintiffs brought trover for certain bills of exchange, which they had indorsed in blank, and sent to their bankers, to be received by them when due, and carried to their account; and the balance of account was in favor of the plaintiffs. These bankers deposited the bills with the defendants and received a sum of money upon the deposit; the defendants knowing nothing of the circumstances under which they were received. The

plaintiffs were nonsuited; and Eyre, C. J., says: "For the purpose of rendering bills of exchange negotiable, the right of property passes with the bills. Every holder with the bills takes the property; and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable." He adds: "But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between acceptor and drawer and the third person holding the bill for value; and the rule is so strict, that it will be presumed he does hold the bill for value, until the contrary appears." The case in which the opinion was given, was not indeed one where the defendant claimed the bill on account of a prior indebtedness; and, therefore, it has been supposed, that this eminent judge referred only to that class of cases, where value was received at the time of the transfer, in contradistinction to those cases, where the consideration was a pre-existing debt. But that the chief justice recognized no such distinction; nay, that he denied that any such distinction existed, is apparent from his remarks, in a case decided by him but a few years before, when he was chief baron of the exchequer, in case of *Plumb v. Fluitt*, 2 Anst. 433, 439.

That was a bill in chancery, by one who had the title-deeds deposited with him, as security against a person who had taken a mortgage of the depositor to secure an antecedent debt. The lord chief baron says: "I wish I saw in a court of equity some solid distinction established between a consideration which is an old debt and a sum advanced *de novo*. There certainly is a great difference. In the one case, the creditor jumps at any security he can get; he takes the deed of conveyance now, and trusts to get the title-deeds afterwards; but until such a distinction is established, it is difficult to apply the reasoning which would belong to it." This was not a case of negotiable paper; and it by no means follows, that because the judge was anxious that a court of equity should make such a distinction in that case, he thought a court of law had such a rule regarding negotiable paper. If then no such distinction was known in a court of equity, in the case of an equitable lien on lands, where no principle regarding the circulation of negotiable paper intervened, can a doubt exist what this judge meant by value, in the case of *Martin v. Collins*? And if the courts of equity have not known such a distinction where transfers of land are concerned, it will not readily be believed, that such a principle was estab-

lished in courts of law, in cases where the currency of the country was concerned, and that this should not have been attended to, by a learned judge.

The case of *Boehm et al. v. Sterling*, 7 T. R. 423, was tried within a year after *Collins v. Martin*. The plaintiff's claim was founded upon a check, given by the defendants, as a counter security for an acceptance of Muilman and Nantes, which acceptance the defendants had themselves taken up; so that the consideration of the defendants' check had entirely failed; but it had been passed, by Muilman and Nantes, to the plaintiffs, for a valuable consideration, viz. (says the reporter), an antecedent debt. The question at the trial was, whether the check was overdue; and Lord Kenyon says, the proposition on which the defendants rely, is not that the plaintiffs have not given a valuable consideration for the check; and reproaches the defendants, in severe terms, for the defense which they interposed, which was founded upon a misdating of the draft by themselves. In this case, the sum in dispute was large (about twelve thousand dollars); the counsel eminent (Erskine and Gibbs); the only consideration pretended, an antecedent debt. If there is any foundation, therefore, for the defendants' claim in this case, the defense in that case was complete; and it was entirely overlooked, and the defendants were exposed to the censures of the judge for their audacity in the defense they made; and neither counsel nor judge seemed to have imagined that an antecedent debt was not a valuable consideration.

So where a bill of lading, which is a negotiable instrument, is indorsed and delivered, by the consignee, to a third person, *bona fide* and for a valuable consideration; it passes the property of the goods, so that the original vendor can not stop them *in transitu*. In a case where the assignee had received the assignment in payment of a debt then due and for a further advancement, the jury, under the direction of Lord Ellenborough, found, that the consideration was a valuable one; and that opinion must have been satisfactory to the court of king's bench, as they refused a new trial: *Cuming v. Brown*, 1 Camp. 104; S. C., 9 East, 506.

In the case of *Wookey v. Pole et al.*, 4 Barn. & Ald. 1; 6 Serg. & Lowb. 323, the principal question was, whether an exchequer bill should stand upon the same ground as notes and bills of exchange. Still the facts in the case, with the opinion of the judges, have an important bearing upon the principles under discussion. The plaintiff being owner of a bill of one thousand

pounds, sent it, by his wife, to Pawsey & Eaton, stock brokers, to be sold and vested in stock. He indorsed the bill in blank. The defendants were also brokers; and Pawsey & Eaton had a banking house account with them, and deposited this bill with them; and in consequence thereof, got divers credits, and drew out moneys at various times. On the fourteenth of January, the defendants had notice of the plaintiff's claims; and they sold the bill on the twenty-seventh; Pawsey & Eaton, having then drawn out all the money, except forty-six pounds and ten shillings, and the account remained unsettled. The bill was demanded on the fourteenth of January, and the defendants refused to deliver it, claiming to have advanced money on its security. The plaintiff then brought an action of trover for the bill. The court held, that the action could not be sustained, Bayley, J., dissenting. But that judge says: "The *bona fide* holder, and for a valuable consideration, of a bank note or bill of exchange, has a good title against all the world, because in the case of bank notes, they are considered as money; and it is essential for the purposes of trade, that delivery should give a perfect title; and because, in the case of bills of exchange, this is the law and custom of merchants." And Holroyd, J., says: "It has been long and fully settled, that bank notes or bills, drafts on bankers, bills of exchange or promissory notes, either payable to order and indorsed in blank, or payable to bearer, when taken *bona fide*, and for a valuable consideration, pass by delivery, and vest a title thereto in the transferee without regard to the title, or want of title, in the persons transferring them. The courts have considered these instruments as appendages to money, and following the nature of their principal." And after citing *Miller v. Rice*, and other cases, he adds: "These authorities show, that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in the like manner, by currency or delivery. These decisions proceed upon the nature of the property (*viz.*, money), to which such instruments give the right, and which is itself currency; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it."

And Best, J., says: "It has long been settled, that the right to money is inseparable from the possession of it. I concede, that the representative of money, which is made transferable

by delivery only, must be subject to the same rules as the money which it represents." "It is not because the loser can not know his money again, that he can not recover it from a person who has fairly obtained the possession of it; for if his guineas or shillings had some private marks on them, by which he could prove they had been his, he could not get them back from a *bona fide* holder. The true reason of the rule is, that by the use of money, the interchange of all other property is most readily accomplished. To fit it for this purpose, the stamp denotes its value; and possession alone must decide to whom it belongs. If this be correct as to money, it must be so as to what is made to represent money." And Abbott, C. J., says: "Notes and bills have been distinguished from goods, in regard to their transfer, for the convenience of trade and commerce, and in regard to their being mercantile and commercial instruments, and by law negotiable."

In this case, no particular examination seems to have been made as to the exact sums advanced upon this bill, at the time it was received, or when notice was given by the plaintiff; nor was any claim made for the forty-six pounds and ten shillings remaining in the defendant's hands. The court re-examined all the principles laid down by Lord Mansfield, without alluding to any such distinction or limitation as the defendant claims in the case before the court. And one of them gives a satisfactory answer to the claim, that money itself might be followed, if it could be traced.

In a subsequent case, that of *Cranch v. White*, 6 Car. & P. 767; 25 Serg. & Lowb. 641, the counsel claimed the benefit of the distinction between a prior and present debt. That was trover for a bill drawn on one Plimpton, by the plaintiff, and by the plaintiff indorsed, as also by Boyer and Roberts. The bill was lent to Boyer, to raise money upon; who left it with Roberts, a broker, but received no money upon it. The defendant claimed to have received it of Roberts, and placed it to his account. Wilde, sergeant, for the plaintiff, claimed, that the defendant had not given value for it, "and handing it over for an antecedent debt (he said), is not indorsing it for value." "If the defendant gave no new consideration, as a ground for the delivery of the bill, it is not valuable." And he submitted it as a point of law. Tindal, C. J., without taking any notice of this part of the claim, told the jury, that as far as they were concerned, the question was, "whether the defendant had any knowledge or notice, or means of knowledge in his power, that

the bill was only put into Roberts' hand for discount:" "Whether the defendant took the bill *bona fide*, without any notice of the manner in which it had been obtained by Roberts." The jury found, that it was not so taken; which the chief justice said, was a verdict for the plaintiff.

In *Bramah et al. v. Roberts et al.*, 1 Bing. (N. C.) 469; 27 Serg. & Lowb. 460, the indorser brought an action against the acceptor of a bill of exchange. The defendants, under the rule recently established for pleading, pleaded specially certain facts, tending to show, that the acceptance was not obligatory. To which the plaintiffs replied a delivery to them of the bill, fairly and *bona fide*, for a good and valuable consideration, that is to say, for moneys advanced, due and owing to them, and denying notice, etc. To this replication there was a special demurrer, showing, among other causes, that the plaintiffs had not stated whether the moneys were advanced at the time when the bill was indorsed to them, or whether they had been previously advanced, and were due before the bill was indorsed. The replication, however, was held good; and it was intimated, that a more general allegation would have been good.

Park, J., says: "If the bill of exchange was indorsed and delivered to the plaintiffs, for a good and valid consideration, that is to say, for money advanced by, and due and owing to the plaintiffs; and they say, that at the time it was indorsed to them, they had no notice whatever of the fraud, it must be taken that the bill was given for some antecedent debt. According to the plain import of the words, it would lead any man to conclude, that at the time of the indorsement there was a full, fair, and *bona fide* consideration given for this bill of exchange." After the opinion of the court had been given upon this demurrer, a motion was made to amend, upon an affidavit, showing, among other things, that when the plaintiffs discounted this bill, they made up the amount by deducting fifty-seven pounds due to them from Hunt, from whom they received it (as the plaintiffs, in this case, deducted one hundred and twelve dollars and eighty-five cents from what they paid Stevens). Tindal, C. J., after intimating that it was too late to make that defense, says, "These facts only raise an argumentative case: from what I have heard, if I had been a jurymen, I should think the discount of this five hundred pound bill, minus the fifty-seven pounds, showed a confidence in the integrity of this transaction rather than any collusion between the plaintiffs and Hunt," and the rule was discharged: 1 Bing. (N.

C.) 481; 27 Serg. & Lowb. 468. Upon every principle, if the distinction contended for by the defendant, was recognized by the English courts, the defendant was entitled to have deducted the fifty-seven pounds, the antecedent debt; but that seems to have constituted no part of their defense. This fact seems to have been introduced merely to strengthen the proof of collusion.

Several other cases might be cited, in which it would seem as if the distinction claimed by the defendant must have been recognized, if it existed; and would, if adopted, have saved most of the discussions which ensued: *Hayward et al. v. Watson*, 1 Bing. 469;¹ 15 Serg. & Lowb. 58; *Bleaden v. Charles*, 7 Bing. 246; 20 Serg. & Lowb. 119; *Fentum v. Pocock et al.*, 5 Taunt. 192; *Evans v. Smith*, 4 Binn. 366.

But a case before any of these, will show how this question was settled, in Great Britain, in the early days of commercial law. A. gave a bill of exchange for value received; B. assigned it to C., for an honest debt; C. brought *indebitatus assumpsit* on this bill against A., and had judgment; upon which A. brought his bill to be relieved in equity against this judgment, because there was really no value received at the giving of this bill, C. could have no prejudice, who might still resort to B. upon his original debt. It was answered, that it might be relieved against B., or any claiming as servant or factor of A. to the use of B. But the chancellor held, that C., being an honest creditor, and coming by this bill fairly, for the satisfaction of a just debt, he could not relieve against it, because it would tend to destroy trade; which is carried on, everywhere, by bills of exchange; and he would not lessen an honest creditor's security: *Anon.*, Com. 43. This case, it is true, is anonymous; but it is reported by Chief Baron Comyns. It differs, in no material respect, from the present case, except that it was an application in chancery; a court of law having decided upon the claim. There, as here, no consideration passed for the bill; and it was agreed there, as it is here, that as between the original parties, there would have been relief. There, the only consideration paid by the holder, was a prior debt; by Lord Mansfield, in the cases cited from Burrow and Douglass. "It would tend to destroy trade, which is conducted everywhere, by bills of exchange." Until we find, that this law has been overruled, we can not doubt what is the common law principle.

It has been argued, that in case of an antecedent debt, the

1. Can not be found.

credit is not given upon the security taken, as in the case of advancing money or goods, at the time. When a creditor gives up a security, which he then holds, or receives a note or draft in satisfaction or extinguishment of an antecedent debt, it seems to the court as if he did this upon the credit of the security he then receives; and in this opinion they are confirmed, by the view taken on this subject, in a different class of cases, by the supreme court of the United States. In *Payson et al. v. Coolidge et al.*, 2 Gal. 233, the defendants having agreed, upon certain terms, to accept a bill of exchange, which might be drawn thereafter, the promisee, upon the faith of this, drew upon the defendants; and this draft was received, by the plaintiffs, in part payment of the debt then due them; and they brought this suit against the defendants as acceptors of the draft. Story, J., says: "I take it to be clearly settled, that a promise to accept a non-existing bill, if shown to a third person, who, upon the faith of such promise, receives the draft for a valuable consideration, is, in point of law, an acceptance. There is no foundation for the distinction asserted, by the defendants' counsel, as to receiving such a draft for a pre-existing debt. It is sufficient, that it is received for a fair and valuable consideration, and on the faith of a promise by the drawees to accept it. Although a debt be already due, the party who receives such a draft in part payment, thereby as much gives credit to the drawer and acceptor, as a party who advances his money upon the draft." And in the same case in the supreme court, Chief Justice Marshall remarks: "That in all cases, the person who receives such bill in payment of a debt, will be prevented from taking other means to obtain the money due to him." "And the mere circumstance that the bill was taken for a pre-existing debt, had not been thought sufficient to do away the promise to accept:" 2 Wheat. 66, 73. And in a more recent case, Story, J., in giving the opinion of the court, says: "It can make no difference in law, whether the debt for which the bill is taken, is a pre-existing debt, or money then paid for the bill. In each case, there is a substantial credit given, by the party, to the drawer upon the bill; and the party parts with his present rights at the instance of the promisee." *Townsend v. Sumrall*, 2 Pet. 170, 182.

These opinions are in entire accordance with what has been understood as the law of this state.

Another objection ought to be noticed. It was said, that as a note or bill, which does not prove productive, does not dis-

charge a previous debt, the receipt of this note had not the effect of discharging the plaintiff's debt; and so there was no valuable consideration. But in this case, it was put to the jury, whether it was received in satisfaction and extinction of the plaintiff's debt. Besides, the argument that the debt was not paid, by the receipt of this note, because the plaintiff's title to the note is invalid, is an assumption of the point in dispute; for unless it is proved that they have no title, the debt is paid; and until that point is established, the plaintiffs can have no remedy, except upon this note.

It is said, however, that the decisions of the state of New York do not conform to these principles; and that this case is to be governed by their laws. The case of *Bay v. Coddington et al.*, 5 Johns. Ch. 54 [9 Am. Dec. 268], was a bill in chancery to compel the defendants to give up certain notes, which they had received from Randolph & Savage, upon the eve of their failure. The plaintiff had commissioned Randolph & Savage to sell his vessel, and transmit the avails. The sale was made on the third of June; and Randolph & Savage took notes payable to their own order; and on the twelfth of June stopped payment, and delivered over these notes, with other property, to the defendants, not in payment of a debt, but to secure them for responsibilities they were under for Randolph & Savage, and for notes by them lent to Randolph & Savage, which were not then due. The plaintiff, after demand, brought this bill to obtain these notes; and Chancellor Kent recognizes the rule as laid down by Lord Mansfield, but says, the defendants are not holders of that description. "The notes," he said, "were not negotiated to them, in the usual course of business or trade, nor in payment of any antecedent or existing debt; nor for cash or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes. They were received from Randolph & Savage after they had stopped payment and become insolvent, within the knowledge of the defendants; and were seized upon, by them, as *tabula in naufragio*, to secure themselves against contingent engagements previously made for Randolph & Savage, on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration, within the meaning or policy of the law." He adds, that "it is the credit given to the paper and the consideration *bona fide* paid on receiving it, that entitle the holder, on grounds of commercial policy, to such

extraordinary protection, even in cases of the most palpable fraud:" 3 Kent Com. 81.

It is not believed that this learned judge meant to go abreast of the principles of the cases cited, particularly, when he says, these notes were not negotiated in payment of antecedent debts. He only takes the ground that the case before him was not within those principles. The facts disclosed were sufficient to induce any honest mind to incline strongly against that defense; nor do we doubt the correctness of that decision. These notes were never paid away, by Randolph & Savage to the defendants, in the ordinary course of business, nor in payment of any antecedent debt. They were handed over, by insolvents, as their last acts, to secure their confidential friends from responsibility, by which they might be subjected. It was the closing scene of the commercial life of those who transferred this paper, and was entirely out of the ordinary course of trade. It was, indeed, *tabula in naufragio*. This case was removed to the supreme court of errors; and it is true, that in giving their opinions, some judges, whose opinions are entitled to great respect, say, that an antecedent debt is not a valuable consideration within the rule: 20 Johns. 637. If the view we have taken of that case was correct, such an opinion was not necessary for its decision; and, of course, would not have been conclusive upon the question. The supreme court, and the chancellor, and the superior court of the city of New York, have taken a different view of it; and held themselves bound, by these opinions, in cases where the transfer has been made in the course of business, *bona fide*, but for an antecedent debt. That it has been difficult to convince the circuit and other inferior courts of this, is apparent from the number of cases which have gone up; the result of which, has been, that by a course of decisions, an antecedent debt is not considered as such a valuable consideration as will support the claim of a *bona fide* holder of a negotiable instrument, to the injury of the right of the original parties: *Wardell et al. v. Howell*, 9 Wend. 170; *Rosa v. Brotherson*, 10 Id. 85; *Root v. French*, 13 Id. 570; *Payne v. Culler*, Id. 605; *Dickerson et al. v. Tillinghast et al.*, 4 Paige Ch. 215, 222; *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 562.

Whether these decisions will finally receive the sanction of the supreme court of errors, can not be known. That they have not met the entire approbation of that body, appears by a doubt expressed by Beardsley, senator, in *Driggs v. Rockwell*,

11 Wend. 509, and by the opinion of Tracy, senator, in the case of *Morton et al. v. Rogers et al.*, 14 Id. 575. A material inquiry there was, whether the holder of negotiable paper would be required to prove the consideration for which he obtained it, on the defendants having proved the original consideration fraudulent. The learned senator remarks: "While bills of exchange and promissory notes, of some form, constitute the medium of exchange, the representative of the property of the country, and in a great measure its currency, and consequently, the basis of general credit and business, it is natural, and indeed inevitable, that they should often pass from hand to hand, for considerations known only by the parties to the transfer. It would, therefore, greatly impair the confidence in these instruments of trade, and cripple their usefulness, if the holder of them, for a light cause, could have his title impeached, and be required to sustain it, by positive proof of the time, place, and circumstances of his acquiring it. As the course of commercial and other business now is, a *bona fide* holder might be involved in serious inconvenience and difficulty to make out the fact; and would be sometimes defeated of his security, though he had obtained it fairly, in full confidence of the unimpeachable nature with which the law had clothed this species of paper. If to this embarrassment there be added the one arising out of another doctrine, which has recently obtained, and which I am inclined to think no better founded in principle or authority—I mean the doctrine, that the consideration of a promissory note is impeachable, in the hands of a *bona fide* indorsee, taking it in payment of, or security for, a precedent debt—the two embarrassments together are fitted to produce an important change in the circulation and usefulness of negotiable paper."

Notwithstanding the doubts or opinions of individual members of the supreme court of errors, if this case was to be decided by the laws of New York, and the reports of those cases are to be considered as evidence of them, we should feel bound by these decisions, without anticipating what will be the opinion of a court of *dernier ressort*, however unfortunate it might be to the plaintiffs that they could not avail themselves of that opinion.

We are then called upon to decide, whether upon the facts before us, this case is to be determined according to the laws of the state of New York. These parties are described as belonging to New York; and from the motion it appears, that the transaction, so far as it respects the plaintiffs, took place in New

York. There is, however, nothing in the case, to show, that it was agreed, or proved, upon the trial, what were the laws of that state upon this subject; nor does it appear, that such a question was made below; and it is a well-established rule, that the laws of one country or state must be proved, before they can be noticed in another country or state: *Thompson v. Kelcham*, 8 Johns. 189 [5 Am. Dec. 332]; *Holmes v. Broughton*, 10 Wend 75 [25 Am. Dec. 536]; *Bracket v. Norton*, 4 Conn. 517 [10 Am. Dec. 179]; *Hempstead v. Reed*, 6 Id. 486; *Sterling v. Plainfield*, 4 Id. 116.

As the reports of the state of New York have been adverted to, by the counsel for the parties throughout the trial, as the evidence of the law of that state, perhaps the court might fairly say, that the parties had consented to admit them as evidence of the law of that state, if it appeared upon this motion, that the case was placed upon the ground of those laws. But it is not stated, that the question whether this case was to be governed by the laws of New York was ever raised in the court below, and the judge who presided, informs us, that it was not in fact made, although these decisions were alluded to, as evidence of the common law. Now, our rule is, that the precise point made by the party, and the precise opinion expressed by the court, shall appear upon the motion: 6 Conn. 327. If then, we were to grant a new trial, it would not be because the charge was incorrect upon the points presented, but because there was an omission to present certain points—the very thing the rule was designed to guard against, as we have repeatedly decided: *Davidson v. Bridgeport*, 8 Id. 476; *Torry v. Holmes*, 10 Id. 499; and this is in accordance with the practice in Westminster Hall: *Chesterman v. Lamb*, 2 Ad. & El. 129; *Moore v. Eddowes*, Id. 133; 29 Serg. & Lowb. 48, 50. In the case of *Crandall v. The State*, 10 Conn. 340, we did reverse a judgment upon a point not made below. That, however, was a criminal case, and upon a writ of error; and a majority of the court were of opinion, that in such a case they could not say there was not in the record an error, when the error was manifest upon inspection. And it is well known, that upon writs of error we are bound by technical rules, which do not prevail upon motions for new trial. Believing that justice has been done, in this case, we do not feel it to be our duty to open it for the purpose of permitting the party to present a new question, upon which no opinion was asked or given.

In this opinion the other judges concurred.

New trial not to be granted.

Cited in *Frost v. Clark*, 13 Conn. 387, and *Bears v. St. John*, 16 Id. 329, to show that no point will be considered on motion for a new trial or on appeal, that was not made on the trial in the lower court. Also in *Hoyt v. Seelye*, 18 Id. 358; and *Bristol Knife Co. v. First Nat. Bank*, 41 Id. 429, to the effect that he who has put it in the power of another to defraud should himself sustain the loss. In *Daggett v. Whiting*, 35 Id. 372, it was decided that a party who takes a note, knowing it to be without consideration, can not recover thereon, citing principal case. In *Bridgeport City Bank v. Welch*, 29 Id. 476, and *Roberts v. Hall*, 37 Id. 211, the doctrine of the principal case, that a transfer of a note for a pre-existing debt, is a *bona fide* transfer for value, and the transferee takes the note discharged of any equities existing between the parties thereto, was approved, and the correctness of that case was held never to have been questioned in Connecticut. The principal case is also cited in *Grosevenor v. Bank*, 13 Id. 108; *Roe v. Jerome*, 18 Id. 158; *McCaskey v. Sherman*, 24 Id. 613. In *Dyer v. Smith*, 12 Id. 390, it was held that the laws of one state in the union, with respect to another state, are placed upon the same ground as the laws of a foreign state; and that whenever they are brought in question they must be proved as other facts, citing the principal case.

BONA FIDE HOLDER, WHO IS.—Whether a person to whom a note is negotiated, in consideration of a pre-existing debt, is such a *bona fide* holder for value, as will be protected against the equities of the prior parties, is considered at length in the note to *Bay v. Coddington*, 9 Am. Dec. 272.

BAILEY v. TAYLOR.

[11 CONNECTICUT, 331.]

WHERE THERE IS AN ERASURE OR ALTERATION in an instrument under which a party claims title, against his interest, the law does not presume that it was improperly made, so as to throw upon him the burden of accounting for it.

JURY MUST DETERMINE in such case, from all the circumstances, whether the erasure or alteration was made before or after the execution of the instrument; and if after, whether it was with the assent of the adverse party; and consequently, whether it rendered the instrument invalid or not.

ASSUMPSIT on a promissory note, by which the defendants promised to pay plaintiff or bearer, on demand, five hundred dollars, with interest. Taylor was defaulted, and Avery, the other defendant, pleaded *non assumpsit*. At the trial plaintiff produced the note and proved the signatures of the defendants. No other evidence was offered. Avery claimed that from an inspection of the note it appeared to have been altered from six hundred to five hundred dollars, and that this had been done without his knowledge or authority, and that the note was for that reason void, unless plaintiff proved that the alteration was made before execution, or afterwards with his consent.

The plaintiff claimed that there had been no alteration, but if there had, that the note was not thereby rendered invalid, unless defendant showed that it was improperly made. The court charged the jury that if such an alteration was made in the note as the defendant claimed after its delivery, without the latter's consent or knowledge, their verdict must be in his favor. No instruction was given as to the claims of the parties respectively upon whom the burden of proof lay. Verdict for plaintiff. Defendant moved for a new trial for misdirection.

Brainard and Strong, for the motion.

Goddard and Isham, *contra*.

WILLIAMS, C. J. The defendant does not complain, that the question as to the alteration of the note, and the time of that alteration, was submitted to the jury; but he insists, that if they found such alteration, the note must be found void, unless the plaintiff accounted satisfactorily for such alteration: in other words, that every note or other written instrument, in which an erasure or alteration appears, is void, unless the plaintiff can and does produce evidence to show, that such erasure or alteration was made under such circumstances as not to impair the instrument. The principle is one of great importance, as it may affect much of the ordinary business among us. On the one hand, it is said, that this rule is necessary, as a safeguard against the alteration of instruments, which must be in the hands of a party whose interest might lead him to tamper with them, unless they were secured by heavy penalties. On the other hand, it is said, that it would impose an unnecessary incumbrance upon ordinary transactions, and make void many instruments, which were honestly made, for want of preserving such proof. In ancient times, when few could write, and when the business which required writing, was done by those who were skillful, such a rule as the defendant claims, might not have been greatly felt in its operation; and we find, by the ancient decisions, where a deed was suspicious by rasure or avulsion of the seal, the party, on oyer of the deed, might demur, and put it into the judgment of court, or plead *non est factum*: Co. Lit. 35, n. 7. The court might thus decide, upon inspection of a deed, that it was void. Such a principle, however, could not long be supported; and of latter times, says Lord Coke, the judges have left it to the jurors to try whether the rasure or interlining was before the

delivery: *Leyfield's case*, 10 Rep. 92; Co. Lit. 225, a; 4 T. R. 338; 2 Dall. 306; 1 Pet. 560; 2 N. H. 543.

The defendant does not claim, in face of these authorities, that the question was not properly left to the jury, but that it should have been accompanied with such instructions as would have left them nothing to do. The plaintiff claims, that it is too late to make this objection, as the jury were instructed, that if the note was altered after delivery, and without the knowledge or authority of the defendant, it was void; and as they have found that it was not void, they have found such facts as leave the plaintiff entitled to a verdict, at all events. But if they found such facts in consequence of an omission of the court to instruct them on a question of evidence, upon which they ought to have given an opinion, it is apparent, that the result may be incorrect. The question, therefore, fairly arises, whether the burden of proof regarding this alteration, lay upon the plaintiff.

There being no proof but that the note was in the handwriting of the signer, the court can not know, whether the supposed alteration was in the handwriting of the plaintiff or defendant, or any different hand from either of them, or that the plaintiff could gain anything thereby, or had any motive in proving such alteration. It would rather seem as if the interest of the defendant must have been promoted, rather than the plaintiff's, by reducing the sum to be paid, from six hundred to five hundred dollars. The defendant's claim, then, is this: that such is the inflexible rule of law, that whenever an instrument in writing is altered in a material part, by rasure or interlineation, however much to the apparent injury of the person claiming under it, that instrument must be considered void in his hands, unless he can show how and when that blemish was made. We have already alluded to the ancient law regarding deeds, and the change which was made in it, in the days of Lord Coke. And although in *Leyfield's case*, it is said, that the jury are to try whether the rasure or interlining was before the delivery, yet it would seem as if they must try all the other questions of fact regarding them; and such seems to be the practice: 2 Wend. 555 *et seq.* And it was decided, at an early period, that an interlineation, if nothing appears against it, will be presumed to be made at the time of making the deed, and not after: *Trowell v. Castle*, 1 Keb. 22. If it be said, that the authority of Keble is not great, it may be added, that this case is cited as law, in Vin. Abr., vol. 12, p. 53, and vol. 13, p. 41, and also in the notes to Co. Lit. 225; and it is not to be believed

that the editor of the last-mentioned work would cite it, without comment, if it was doubted. So too, in a more recent case of a deed of trust, where the power was extended, by an interlineation of these words, "to grant, sell, and demise, or." Lord Chief Baron Reynolds says, "there is no proof when these words were interlined, or that they were inserted by the direction of Mr. Fowler: therefore, I must look upon them as if they had been originally incorporated in the body of the deed." *Fitzgerald et al. v. Lord Fauconburg*, Fitzg. 207, 213; 13 Vin. Abr. 41; 4 Cru. Dig. 338, tit. 32, c. 26, secs. 10, 11. And the last-mentioned author adds, that the modern practice is, when any alteration, interlineation, or rasure is made in a deed before it is executed, to take notice of it in the attestation: he might have added, according to the advice of Lord Coke to devisors, in *Buller and Baker's case*, 8 Co. 36.

It has been supposed, that the practice of requiring proof of the execution of an ancient deed, which had in it an erasure or alteration, was inconsistent with the above-cited authorities; and Bull. N. P. is cited. It is there said, that in an ancient deed, if there be any blemish in the deed, by rasure or interlineation, the deed ought to be proved, though it were above thirty years old, by the witnesses, if living, and if they be dead, by proving the hand of the witnesses, or at least one of them, and also the hand of the party, in order to encounter the presumption arising from the blemishes in the deed: Bull. N. P. 255. This is almost copied from Gilb. Ev. 104 (Lofft's ed.) But surely it can not mean, that an account must be given of such blemishes; for, proving the handwriting of the witnesses could not do that; and yet the authority does not intimate, that when this proof is made, with proof of the handwriting of the party, the deed would not be valid.

In our own country, the weight of authority, as it respects deeds, is in accordance with these cases. In *Speake v. The United States*, 9 Cranch, 37, Story, J., says, that the fact that there is an erasure or interlineation apparent on the face of a deed, does not, of itself, avoid it. To produce that effect, it must be shown to have been done under circumstances that the law does not warrant. And in *Coulson v. Walton*, 9 Pet. 789,¹ it is said, no one having an interest in this bond could have any motive to alter it, as it seems to have been done. The bond has been in possession of those who held adversely to it; so that its destruction would have advanced their interest. It is

fair to presume, that if the alteration was made by design, it could not have been made, by any one claiming under the bond. And in a question upon this point, in Maryland, where it appeared upon the deed, that the names of the attesting witnesses were erased, the court held, that it was incumbent upon the party who would avoid the deed, by its erasure, to prove, that such erasure was made after the execution and delivery of the deed, and that they were not bound to presume, that the erasure was made by the grantee, or others claiming under him, after the execution of the deed: *Wickes' Lessee v. Caulk*, 5 Har. & J. 41.¹ Judge Swift, in his System, speaking of the same practice here, as to noting the alteration before the attestation, that Cruise mentions, observes: "But now, whether such memorandum be made or not, a mere erasure or interlineation shall not itself be presumed to be done after the execution of the deed, so as to vitiate it, but with the whole of the deed, depends upon the proof of its validity, to be submitted to the consideration of the jury:" 1 Swift Syst. 310. It is true, that McKean, C. J., in a case before him, remarks, that where there is an alteration in a deed, it is not to be presumed it was made before its execution: the presumption is to the contrary, unless otherwise proved: 1 Dall. 67.

In the case of *Jackson d. Gibbs et al. v. Osborn*, 2 Wend. 555 [20 Am. Dec. 649], the judge at the circuit held the doctrine claimed by the plaintiff in this case. That decision, however, was reversed, by the supreme court of New York, who held, that such an erasure or interlineation was a suspicious circumstance, that required some explanation on the part of the plaintiff; but whether it was satisfactory, was for the jury to determine.

In *Prevost v. Gratz*, 1 Pet. C. C. 369, where there were material alterations in an account, in the handwriting of Gratz, and in his possession, making it to differ from the copy in the hands of the other party, Washington, J., says, these circumstances would be sufficient, upon a plea of *non est factum* to a deed, to avoid it. The presumption, in such a case, is, that the alteration was made after the execution of the deed; and the same presumption arises in reference to a settled account.

In the first of these cases, it is merely a passing remark of the judge; in the second, it is one of the points adjudged in the case, but no authority is cited, except Bull. N. P. and Ph. Ev., the first of which has been noticed, and the second is little

more than a copy of it. In the last case, upon the circumstances disclosed, it was certainly correct to say, that a deed in the handwriting of the grantee, differing from another in the hands of the opposite party, by an interlineation in the hands of him who was to profit thereby, would be void, unless these circumstances were explained, not on account of the interlineation merely, but on account of the alteration coupled with the other circumstances.

On the whole, were the instrument in question a deed, we could not hesitate as to the result.

The next question is, whether the alteration in a note is to have effect greater than a similar one would have in a deed. So late as the year 1791, in the case of *Masters v. Miller*, 4 T. R. 320, it was much litigated, whether the reverse of this was true; that is, whether an alteration, which would make void a deed, would also vitiate a bill of exchange. It was decided that it would. The argument of the judges who supported the decision, was drawn from the case of deeds; and all went to show, that the principle was the same in writings under seal, and not under seal. And Ashhurst, J., though he thinks that if there was a difference, the objection should prevail with greater force in negotiable instruments, admits there is no difference.

But it is contended, that the late English cases support the principle claimed by the defendants.

Johnson et al. v. Duke of Marlborough, 2 Stark. 318.¹ That was a bill of exchange, the date of which was altered by the defendant himself; and the question was, whether this alteration was made before the indorsement. And Abbott, J., said, in answer to the claim that he would presume it done before the indorsement, that he could not presume one way or the other; and that unless it could be proved, that the alteration was prior to the acceptance, the bill was void for want of a new stamp. The only question here arose under the stamp act; for upon no common law principle could the defendant destroy his acceptance, by his own act.

This case was followed by *Bishop v. Chambre*, 3 Car. & P. 55; 14 Serg. & Lowb. 207, in which the note was dated twenty-seventh of May, 1824, and Lord Tenterden remarked, that the word May, appeared to be in a different hand from the rest of the note, and a portion of the paper had been cut off; and then remarked, when a note appears to have undergone alteration, the

1. 2 Stark. 318.

party suing upon it, must account for that. This case was argued, by the defendant's counsel, upon the question, whether the word May was added after the note was in the hands of the plaintiff; and that was the question submitted, by the judge, to the jury; and they were told, that if after a note was delivered to the party, who is to derive a benefit from it, it is altered, it is rendered invalid; and the judge, in that case, and the whole court afterwards, as well as before, held, that a note once in the hands of the holder, as a perfect instrument, can not be altered, even with the consent of all parties, except to correct a mistake, because it would require a new stamp: See *Bathe v. Taylor*, 15 East, 412.

The next case is that of *Henman v. Dickinson*, 5 Bing. 183; 15 Serg. and Lowb. 409. There, a bill was drawn by one Potter, on the twenty-ninth of February, for forty-nine pounds seventeen shillings and sixpence, and accepted by the defendant. The wife of Potter had testified, that it was in fact drawn and accepted on the twenty-second of February, for forty pounds seventeen shillings and sixpence; and before it was indorsed, Potter altered it. Two questions were made before the court of common pleas, whether Potter's wife could be a witness, and upon whom lay the burden of the proof as to the alteration of the bill. The first point was not decided. On the second, Best, C. J., said, but we are of opinion, that where an alteration appears upon the face of the bill, the party producing it, must show, that it was made with consent of parties, or before the issuing of the bill. And Park, J., says, where the plaintiff sues on an instrument, which has manifestly been altered, it is for him to show, that the alteration was not improperly made. I am sure this has been decided; and good sense points out that it ought to be so, because the defendant can have no means of knowing the circumstances of a subsequent alteration. The rest of the court concurred. In this case, it is true, that nothing is said about the stamp laws; and the general position seems applicable to all written instruments. But if the law respecting deeds is such as we suppose, is it to be believed, that the whole doctrine is to be changed, without a single reference to the ancient decisions regarding deeds, or any authority cited? Or can we suppose, after what fell from the court in *Masters v. Miller*, that the court mean to make a distinction between notes and deeds, and yet that such a distinction should not be attended to, in this case? Besides, five years after this decision, a discussion arose before

Lord Lyndhurst, which would have been quite unnecessary, if the general principle is settled, in the last case, that is supposed.

Taylor v. Moseley, 6 Car. & P. 273; 25 Serg. & Lowb. 393. That was an action upon a bill, drawn by Thorn upon the defendant, in favor of one Knight, and accepted by the defendant. It was proved, that Thorn took words out of writings by a chemical process; that the words, "one hundred and twenty-five pounds," the sum for which the bill was drawn, were compressed in too small a space; that the paper there was rather darker, etc. When indorsed, it was in the same state as at the trial. It was accepted, by the defendant, "payable at Cockburn;" but the last words were not in the handwriting of the defendant. For the defendant, *Henman v. Dickinson* was cited as in point. The plaintiff's counsel say nothing about that case, but in face of it, insist, that the other side must show, that the alteration was made after the acceptance. The judge tells him, he must make out the case; he still insists upon that point; and his lordship says, the question is, whether the defendant was party to such a contract. The better way will be to reserve the point, and not stop the cause. According to the case of *Bishop v. Chambre*, it seems to be a question for the jury, if the plaintiff gives no account of the alteration, whether it was made after the note had become a perfect instrument in the hands of the payee. He then submits to the jury, whether from the circumstances attending the bill, there was not an alteration; and if so, whether it was since the acceptance: if it was, he says, it was not the defendant's contract. He then goes on, and reads Lord Tenterden's opinion, that it lay on the plaintiff to account for the suspicious form and obvious alteration of the note; and then leaves it to the jury, whether the alteration was after the acceptance. He says not a syllable about the case of *Henman v. Dickinson*. Had he recognized it as law, he would only have said to the jury, as the plaintiff has failed to account for this alteration, your verdict must be for the defendant; instead of which, he leaves it to them to find, even though the plaintiff has not accounted for it, whether it was made before or after acceptance. Such is Lord Lyndhurst's construction of the law, subsequent to that decision. If, then, the case in the common pleas does import all that is claimed, it would seem not to be recognized to that extent, by any case before or after it. We do not, then, feel bound by it.

In New Hampshire. The case of *Bowers v. Jewell*, 2 N. H. 543, was an action upon a note, altered in its date, from 1809 to 1819. There, Woodbury, J., says: "This alteration was made after delivery; and the note being under the plaintiff's control, it must be presumed to have been done by him or his direction." He then goes on to say, that "the intent must be fraudulent; it must be done with an eye to gain an advantage; and that can not be the case, if the alteration makes the sum less, or gives longer time of payment; and whether the alteration is fraudulent, should be submitted to the jury." Without inquiring how far these rules are conformable to our law, it is enough to say, that if adopted, they would prevent a new trial; as it can not be claimed, the alteration could have been made by the plaintiff with an eye to his advantage, or for fraudulent purposes.

But in New Jersey, in the case of *The President and Directors of the Cumberland Bank v. Hall*, 1 Halst. 215, the question before us was fully discussed, by counsel. That was an action by the indorsee against the maker of a note. Hall made a note payable to C. Acton and H. Thompson, or order, which was by them indorsed, but the words, H. Thompson, were erased, so that it read payable to C. Acton, or their order. The judge at the circuit charged the jury, that the plaintiff was bound to account for this alteration; and unless it was shown to have been done before the execution of the note, the law presumed it was done afterwards. Another question arose in the case, and judgment was reversed. The opinion of the court is not given; but in the marginal note, the reporter states these as the points decided: "1. The law does not presume that an alteration apparent on the face of a note was made after its execution; 2. But whether the alteration was after or before the execution of the note, appears to be a question for the jury to decide."

And in *Nichols v. Johnson*, 10 Conn. 198, where an alteration was made on the memorandum book of an auction sale, by adding a date, Judge Church, in giving the opinion of the court, says: "It is not to be presumed the alteration was made by the plaintiff, as there were no facts disclosed from which such presumption can arise."

The result to which we have arrived is, that where there is an erasure or alteration in an instrument under which a party derives his title, and the adverse party claims, that such erasure or alteration was improperly made, the jury are, from all the circumstances before them, to determine, whether the instru-

ment is thereby rendered invalid. Circumstances may be such as may require this explanation on the part of the plaintiff; or, on the other hand, may arise where it would be absurd to require it. In the present case, it is claimed, there is a legal presumption which requires the jury to believe, that the plaintiff altered this note after its execution, and without the consent of the opposite party, not that he might receive more upon it, but that he might be entitled to one hundred dollars less. Such a presumption, in face of every motive, we are entirely satisfied, no rule of law requires; and the charge was submitted to the jury precisely as it should have been. Of course, there ought not to be a new trial.

In this opinion the other judges concurred, except CHURCH, J., who was absent.

New trial not to be granted.

Cited with approval in *Hayden v. Goodnow*, 39 Conn. 169, upon the point that the effect of erasures made by the plaintiff in a note held by him upon his title was a question of fact for the jury.

ALTERATION OF WRITINGS.—This subject is considered at length in the note to *Woodworth v. Bank of America*, 10 Am. Dec. 267 *et seq.* Effect of, is generally to make the writing inoperative: *Woodworth v. Bank of America*, d. 239; *Walton v. Walton*, 11 Id. 456; *Babb v. Clemson*, 13 Id. 684; *Lewis v. Payn*, 18 Id. 427. Changes may be made by consent: *Campbell v. McArthur*, 11 Id. 737.

WHIPPLE v. FULLER.

[11 CONNECTICUT, 582.]

AT COMMON LAW AN ACTION upon the case may be maintained for a vexatious civil suit, in which there was no arrest or holding to bail.

ACTION ON THE STATUTE to prevent vexatious suits, can not be joined with an action on the case at common law for such a suit.

JUDGMENT BY DEFAULT cures no other defects than those of form.

IMPROPER MISJOINDER of two causes of action is not cured by plea and judgment, where the defendant pleaded the general issue and then suffered judgment by default.

ACTION, brought by Fuller against Whipple for a vexatious suit. The complaint contained two counts, the first being upon a statute of Connecticut to prevent such suits; and the second was in case at common law. Each count claimed nine hundred dollars damage. The defendant pleaded the general issue, but subsequently suffered judgment by default. The plaintiff remitted the damages to three hundred dollars, and took judgment for that amount.

Judson and Johnson, for the plaintiff in error.

Goddard and Dyer, *contra*.

CHURCH, J. The declaration in the case to be reviewed on this writ of error, contains two counts: one founded upon the statute of this state to prevent vexatious suits, in which the plaintiff demands, under that statute, to recover treble damages; and the other is a count at common law for the malicious prosecution of a vexatious and malicious civil action.

Several objections are urged, by the defendant, against the first count, which are of little importance, and of which we need not speak, any further than to say, that we do not recognize their validity. But the defendant in the court below, the present plaintiff in error, supposing his objections to the sufficiency of the first count sustainable, next objects to the second count, and claims, that no action will lie at common law, to recover damages sustained in consequence of being maliciously sued and prosecuted in an unfounded civil action, unless the body of the defendant in such action was arrested, or holden to bail; neither of which was done in the vexatious suit complained of. This objection requires consideration. It certainly has received plausibility, if not direct countenance, from the remarks of some learned commentators, as well as from the decisions of courts.

Lord Coke says: "And therefore, where it is said, that a man shall not be punished for suing of writs in the king's courts, be it of right or wrong, it is regularly true; but it faileth in this special case of the writ of replevin." Co. Lit. 161, a. Mr. Chitty, in his learned notes to the commentaries of Sir William Blackstone, says: "It seems, before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action against the plaintiff, if the proceeding was malicious and without probable cause. But since the Stat. 4 Jac. I., c. 3, which gives costs to a defendant in all actions, in case of a nonsuit or verdict against the plaintiff, and other statutes giving costs to defendants in other stages of the cause, it seems that no action can be supported merely in respect of a civil suit maliciously instituted, except in some cases under particular legislative provisions." 3 Bl. Com. 126 (Chit. ed.) Judge Swift, in his Digest, vol. 1, p. 492, says: "It is well settled, that at common law, no action will lie against one for bringing a civil suit, however malicious and unfounded, unless the body of the party is im-

prisoned, or holden to bail; in all other cases, the costs the party recovers, are supposed to be an adequate compensation for the damage he sustains." And in the case of *Purton v. Honnor*, 1 Bos. & Pul. 205, it was decided, that no action is sustainable for a vexatious ejectment: 7 Petersd. Abr. 5; 12 Id. 403.

It seems to be conceded, however, that where anything is done maliciously, besides merely commencing and prosecuting the malicious or vexatious action, a suit for damages sustained by such act, may be maintained. And therefore it is, that an action is sustainable for a malicious arrest, or a holding to bail for too large a sum, and for maliciously suing out and levying a writ of *fiery facias*: 1 Lev. 275; 2 Wils. 305; *Austin v. Debnam*, 3 Barn. & Cress. 139; 10 Serg. & Lowb. 37; 3 Chit. Bl. 104; 12 Petersd. Abr. 399. Upon the same principle, an action may be maintained, where the property of a party has been maliciously attached upon mesne process, under all jurisdictions where such attachments are known: Hob. 205, 266; 1 Ld. Raym. 377; *Gyfford v. Woodgate*, 11 East, 297; *Wells v. Noyes*, 12 Pick. 324.

But we wish to place our decision of this question upon broader principles; principles which we believe have received the sanction of the common law in its earliest ages. Before the statute of Marlbridge, which was passed in the fifty-second year of Henry III., no costs were recoverable in civil actions. This statute, and others subsequently enacted, gave costs to successful defendants, as it is said, by way of damages against the plaintiff, *pro falso clamore*. Whatever might have been true when the several statutes giving costs were enacted, we can not, at this day, shut our eyes to the truth known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares, that for every injury there is a remedy. Before the statutes entitling defendants to costs, existed, they had a remedy at common law, for injuries sustained by reason of suits which were malicious and without probable cause: Co. Lit. 161 a; 3 Lev. 210; 2 Wils. 305, 379; Hob. 266; 4 Mod. 13; 3 Chit. Bl. 125. And this principle is, and ought to be, operative still, in all cases where the taxation of costs is not an ample remedy: *Saville v. Roberts*, 12 Mod. 208; S. C., 1 Salk. 14. It is upon this principle, in part at least, that actions have ever been sus-

tained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused: 1 Salk. 14; 10 Mod. 148; *Smith v. Hixon*, 2 Str. 977. So also, if two or more conspire to vex and harass any person with groundless and malicious civil suits, they were not only punishable *criminaliter*, but liable to a civil action: Staundford P. C. 172; 2 Inst. 562; Co. Lit. 161 a.

In *Watson v. Freeman*,¹ Hob. 205, and cited in Esp. Dig. 527, it is said, that "if a man sue me in a civil suit, yet if his suit be utterly without ground, and that certainly known to himself, I may have an action against him for the damages he putteth me unto by his ill practice."

Indeed, the principle upon which the second count in this declaration is sustainable, aside from the averment that the plaintiff's property was attached, is the same which sanctions the well-known and frequent actions for malicious prosecutions, and furnishes remedies by actions on the case for the abuse of legal process: 2 Saund. Pl. and Ev. 651; *Luddington v. Peck*, 2 Conn. 700; *Swift v. Chamberlain*, 3 Id. 537; *Watson v. Watson*, 9 Id. 141. And we may say, as applicable to the claim of the plaintiff under this count, in the language of a learned writer on the subject: "Whatever engines of the law malice may employ to compass its evil designs against innocent and unoffending persons, whether in the shape of indictment or information, which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or whether such malice is evidenced by malicious arrests, or by exhibiting groundless accusations, merely with a view to occasion expense to the party, who is under the necessity of defending himself against them, the action on the case affords an adequate remedy to the party injured:" 2 Selw. N. P. 1054. Or we may say with Bayley, J., in the case of *Elsee v. Smith*, 2 Chit. 304; 18 Serg. & Lowb. 344: "If a party falsely and maliciously, and without probable cause, put the law in motion, that is properly a subject of an action on the case."

We think, therefore, upon the fundamental principles and analogies of the common law, that the second count in this declaration is good. But notwithstanding each count in this declaration, separately considered, is good, yet we are of opinion, that these counts could not, by law, be joined in one declaration; that there is here a misjoinder of actions; and that for this cause alone, the declaration is insufficient.

1. *Watson v. Freeman*.

The general rule on this subject, or the rule controlling the greatest class of cases, probably is, that causes of action, which, at common law, require the same judgment and the same general issue, may be joined in several counts in one declaration. But to this rule there are many exceptions. Therefore, actions of debt on bond, and covenant broken, can not be joined, although the general issue of *non est factum*, and the common law judgment of *misericordia*, are common to both. Neither can actions of account or replevin, or an action on book, in this state, be joined with any other cause of action. And the reason is, that the forms of proceeding in some, as well as the essential nature and forms of judgment in others of these actions, are different from the forms of proceeding and judgments in all other cases: 1 Chit. Pl. 196; Gould Pl. 215, 216; 12 Peterad. Abr. 646, 649.

The first count in this declaration is founded upon the statute to prevent vexatious suits; and the plaintiff, by virtue of that statute, demands to recover treble damages. And the second count is at common law, on which single damages only are recoverable. If a general verdict be given for the plaintiff, upon this declaration, or a judgment by default be rendered, is the court to assess single, or double damages? The law requires a judgment upon one of these counts, to be essentially different from the judgment to be rendered upon the other.

This defect is incurably fatal, and would have been so, even after verdict: 1 Chit. Pl. 206; Gould Pl. 219; *Brigden v. Parks et al.*, 2 Bos. & Pul. 424.

It was contended, that this defect was cured, by plea and judgment. The plea was the general issue, and the judgment was rendered upon default. It is certain, that if a verdict, in this case, would not have cured this defect, a plea could not. But a plea, to cure a defect in the proceedings, must be such a plea as by legal intendment at least, admits the facts, the omission of which, causes the defects complained of. But in this case, the general issue admitted nothing; it denied everything: 1 Chit. Pl. 400; 1 Swift Dig. 778.

And a judgment by default, cures no other defects than those of form: Gould Pl. 505.

We therefore advise, that the judgment of the county court, in this case, be reversed.

In this opinion the other judges concurred.

Judgment to be reversed.

Cited in *Linsley v. Bushnell*, 15 Conn. 237, upon the point that taxable

costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit. Also cited in *Stone v. Stevens*, 12 Id. 226.

MALICIOUS PROSECUTION.—To maintain this action it is essential that malice on the part of the defendant, the plaintiff in the prosecution, complained of, and a want of probable cause for instituting such prosecution, be shown: *Frowman v. Smith*, 12 Am. Dec. 265, note. Where in the prosecution of a civil action, a plaintiff maliciously, and without probable cause, seizes the body of the defendant, he will be liable in an action for malicious prosecution: *Williams v. Hunter*, 14 Id. 600. So where an attachment is sued out maliciously and without probable cause, and levied upon the defendant's goods, the plaintiff is liable: *Id.* See, as to the order of proof in an action for malicious prosecution, *Frowman v. Smith*, 12 Id. 268, note. See the note to *Savage v. Brewer*, 28 Id. 257, for a discussion of this action.

CASES
IN THE
SUPERIOR COURT AND COURT OF
ERRORS AND APPEALS
OF
DELAWARE.

KEAN'S LESSEE *v.* HOFFECKER.

[2 HARRINGTON, 103.]

EXECUTORY DEVISES ARE ASSIGNABLE, DEVISABLE, and transmissible to the representatives of the devisee, provided that the identity of the latter is certain, even before the happening of the contingency, and that the object of the devise is fixed.

THE RULE OF THE COMMON LAW THAT AN HEIR must be of the blood of the first purchaser is abrogated in this state by the statute regulating the course of descent.

SEIZIN IS NOT NECESSARY, in this state, to make stock of descent.

EXECUTORY DEVISES UPON THE DEATH OF THE DEVISEE descend in the same course of descent, that does other real estate or interest in real estate, in all cases where the will establishing the devise describes the devisee with certainty.

THE INTENTION OF A TESTATOR is to be collected from the will itself.

TECHNICAL WORDS, OR WORDS OF A SETTLED LEGAL CONSTRUCTION used in a will, will be intended by the court to have been understood by the testator in their proper meaning, unless it plainly appear from other parts of the will that they were used otherwise, or unless a different construction is necessary in order to give sense to the will.

THE DIVISION OF PROPERTY DEVISED TO KIN OF DIFFERENT DEGREES OF RELATIONSHIP is to be *per capita* not *per stirpes*, where the devisees are individually named; and it is enough to put the rule into operation, that, though in the devise there is no mention of the names of the devisees, there is in it a specific reference to another part of the will in which such names are set out.

THE WORDS "equally to be divided" in a devise to kindred will cause the division to be *per capita*, though it is to kindred in different degrees of relationship.

EJECTMENT. A case stated presented facts of which the following are the only ones material: Thomas J. Macomb, seised

in fee during his life of a farm in New Castle county, by his last will and testament devised of the same to his sister Elizabeth Macomb, his brother James B. Macomb, and the four children of his deceased sister, Jennet Clayton. One third was devised to Elizabeth Macomb in fee, to be increased, however, by a life estate in enough of the balance to bring it up to one half. This life estate, however, was to determine in case of her marriage, during the life-time of James Macomb or of his issue, and the one sixth of the estate comprehended therein was thereupon to go one half to James Macomb, the other half to the children of Jennet Clayton, before mentioned. If the determination of the life estate was by her death, it was to go over in the same manner. The devise to James B. Macomb was of one fourth of the said real estate, to be increased, however, to one third upon the determination of the life estate of Elizabeth Macomb before mentioned, whether by her marriage, or by her death during the life of himself or of his issue, and was expressed to be in fee, in case he should leave any child living at the time of his death, otherwise his estate was to be considered a life estate, and upon his death was to determine and go over as an executory devise in the manner following: "If his said interest consists only of the one fourth part, then the whole thereof to my said nephews and nieces" (children of Jennet Clayton, whose names had previously appeared in the will), "and their heirs and assigns; but if it shall consist of the one third part, then the said third part to be equally divided between my sister Elizabeth and my said nephews and nieces, their heirs and assigns forever, as tenants in common and not as joint tenants."

The devise to the nephews and nieces was also of one fourth, to be increased to one third in the eventuality of the marriage of Elizabeth Macomb during the life of James Macomb or of his issue, or if such marriage did not occur, then upon her death. The devises to Elizabeth Macomb and to the nephews and nieces were expressed to be in lieu of certain legacies bequeathed to said Elizabeth and to Jennet Clayton, mother of the last-named relations, by their grandfather, Thomas Irons, and were to determine in case the legacies were claimed by the devisees or by any person in their right. These devisees all survived the testator and became entitled under his will. Afterwards the life estate of Elizabeth Macomb determined by her marriage during the life-time of James Macomb, whereby this latter became entitled to one third of the estate. Yet later,

Elizabeth and her husband, plaintiff's lessor, conveyed the right of said Elizabeth, in the one third of the farm of which she was seised in fee, to Thomas Clayton; but at the time they reserved their interest under the executory devise. Afterwards, Elizabeth Macomb died, leaving her surviving two sons, who both died before the institution of this action, under age and intestate. Yet later, James B. Macomb died without issue, whereby the executory devise over of the real estate devised him took effect. Plaintiff claiming as heir of his two deceased children, brought this suit to determine his rights. The questions of law arising on the case were reserved for the consideration of the court of errors and appeals.

J. A. Bayard, for the plaintiff.

Frame, contra.

By Court, BLACK, J. Upon the facts set forth in the case stated, two questions are presented for decision. The first is—How in this state do executory devises pass when the devisee over dies intestate, before the contingency happens, on which the devise over is to vest or be enjoyed? Is the inheritance transmitted according to the rules of the common law, or does it pass according to the course prescribed by the act of assembly of this state regulating the descent of the real estates of intestates? If the former be the rule by which we are governed, the lessee of Matthew Kean can not recover any part of the land in question, because Matthew Kean is not of the blood of the devisee over, nor the heir of that devisee at the time the contingency happened on which the estate was to vest.

It is admitted that with regard to the one third of the real estate, devised to J. B. Macomb, the limitation over by way of executory devise, to the sister and nephews and nieces of the testator, in the event of J. B. Macomb dying without leaving a child living at the time of his death, is a good executory devise. The sister, Elizabeth, married the lessor of the plaintiff, M. Kean; she died intestate in the life-time of her brother James, leaving two sons, who both died under age intestate, and without issue during the life-time of their uncle James; James B. Macomb afterwards died, never having married.

Contingent as well as vested interests in either real or personal estate, and also executory devises, and all possibilities coupled with an interest, where the person to take is certain, may be assigned or devised, and are transmissible to the representatives of the devisee, if he dies before the contingency happens:

and when the contingency does happen, they vest in the representative of the real or personal estate as the case may be. It is otherwise, if the object of the limitation over is not ascertained or fixed; or the persons to whom the estate is to pass are not ascertainable until the contingency does happen; as in the case of a limitation to the right heirs of a person living; for during the life of such person, it can not be known who his heirs will be, nor in whom the interest is. These principles will be found fully established by the following authorities: 4 Burns Ecc. Law, 139; 2 Wils. 29;¹ 3 T. R. 93,² 94; 1 Ves. 47,³ 237;⁴ 2 Saund. 388,⁵ note h; 1 H. Bl. 30;⁶ Talb. 117; Willes, 211;⁷ 1 P. Wms. 564;⁸ 1 Fearn on Remr. 534, 536, 540; 2 Fearn, 530 *et seq.*; 4 Kent Com. 284, 510.

The English rules or canons of inheritance, are of feudal growth, and in their most essential features have not found favor either in this state, or in our sister states: they have been very generally rejected, and each state has adopted its own rules regulating the descent of real estate, which in the main will be found to be the converse of those which have obtained in England. Primogeniture among the males—the preference of males to females—the exclusion of the lineal ascent of the inheritance—the entire exclusion of the half blood—have been deemed in this state unreasonable, unnatural, and harsh principles, inconsistent with the character and policy of our government, and not calculated to promote the true interests of its citizens.

The system of descent, established by statute in this state as to the real estates of intestates, is as follows: When any person having title, or any manner of right, legal or equitable, to any lands, tenements, or hereditaments, dies intestate as to the same, such lands descend and pass in fee simple: 1 To the children of the intestate and the lawful issue of any such child or children who may have died before the intestate: but if there be no such child or children, or issue of such child or children, then, 2, to the brothers and sisters of the intestate of the whole blood, and to the issue of such deceased brothers or sisters who may have died before the decease of the intestate: but if there be none such, then, 3, in like manner to the brothers and sisters and issue of such of the half blood: but if there be none such, then, 4, to the father of the intestate; or, if there be no father,

1. *Goodright v. Seale.*2. *Jones v. Purr.*7. *Goodtitle v. Wood.*3. *Hedgdon v. Ransom.*4. *Peck v. Parrot.*5. *Purcfoy v. Rogers.*6. *Perry v. Jones.*8. *Pinbury v. Ekin.*

then, 5, to the mother of the intestate; and if there be no mother, then, 6, to the next of kin of the intestate, and to the lawful issue of such next of kin, who shall have died before the intestate. This is the course, not only where there is a fee-simple title, but where there is any manner of right.

Such is our system of descent; one essentially different in every important point from that which the peculiar policy of England has established in that country. We give no preference to males over females, no preference to the eldest son. We do not exclude the half blood from inheriting, if there be no heir of the whole blood. We do not prohibit the lineal ascent of the inheritance, but expressly ordain that the father shall inherit the land of the son, if he leaves neither issue, nor brothers, nor sisters, nor any issue of them. There is nothing in our act limiting the inheritance, when it passes collaterally or ascendingly to those who may be of the blood of the first purchaser. It does not require us, in ascertaining who is heir, to search for the first purchaser, and trace his blood to the claimant. It classes the persons who are to inherit in succession, and requires that they shall have a certain connection or relation to the intestate, but does not require him to connect himself by blood or otherwise with any one beyond the intestate, or with the first purchaser, from whom the estate descended to the intestate, except where the estate passes to brothers and sisters under that act. In that case the brothers and sisters of the intestate, who are of the blood of the ancestor or of the parent from whom the lands came to the intestate by devise or descent, are preferred, if the lands were thus acquired. If they were acquired otherwise, they pass in the manner before stated.

Such being the state of our law, as established by statute, can we hold, as is done in England, that no one shall inherit lands as heir, unless he be of the blood of the first purchaser; or that he who claims a fee simple by descent from one who was first purchaser of the reversion or remainder, expectant on a freehold estate, must be of the same blood, and make himself heir to such purchaser at the time the remainder or reversion falls into possession? To do so would, in our judgment, directly contravene our statute regulating descents. By it the father is made the heir of his child, whenever the child dies without issue, and brothers and sisters, or their descendants, without requiring any connection by blood with the person from whom the child derived the estate—he inherits in such case all his estate; he is

made by the act of assembly his only heir, and takes every interest of his son however acquired.

Suppose one dies, and his estate descends to his grandchild, the mother of the child, who was the daughter of the grandfather, being dead; the grandchild dies, leaving its father to survive; can any doubt exist that, under our laws, the estate would pass to the father of the child, although he has not in him any of the blood of the grandfather, who was the purchaser of the land? So, too, if the estate came to the child from a maternal aunt who had purchased it, the father would inherit it, though not of the blood of the aunt who was the purchaser. The general object of the intestate law in this state is, to continue the estate in the family of the intestate, without regard to the families or connections of those from whom it may have descended to the intestate, and it therefore looks principally to the paramount claim of proximity of blood to the intestate. The single exception is the one we have noted.

In England, seisin is necessary to make the stock of descent, but not so in this state. With us, title or any manner of right, legal or equitable, is sufficient. Executory devises are not considered as bare possibilities, but as certain interests and estates, and they vest or so far vest before the contingency happens, as to pass to the heirs of the devisee over who dies before such contingency, in the same manner as contingent remainders. They are held to be interests vested, though not in possession: *Gurnel v. Wood*, 8 Vin. 112, Ex. 38; 2 Eq. Cas. Abr. 342, Ex. 21; Willes, 213; Talb. 123; 2 Fearne, 532.

When, therefore, Mrs. Kean died intestate, her right or interest in the one third part of the land devised to James B. Maccomb, and which was limited over to her by way of executory devise, descended and passed, not to her eldest son, according to the rule in England, but equally to her two children; on the death of one of these children the entire contingent interest limited over to Mrs. Kean, passed to the surviving child, and on its death, its entire interest, which was the interest devised to its mother, passed, according to our act of assembly (there being neither issue, nor brothers, nor sisters of that child), to its father, the lessor of the plaintiff, who thus acquired all the title, interest, and right which was given under the will by way of executory devise to his wife, by the testator, Thomas J. Maccomb, in the one third of the land; and when the contingency happened of James B. Maccomb dying, without leaving a child in being, which subsequently did happen, Matthew Kean had a

legal right to claim, as heir to his child, such share of that one third part as his wife, if living, would have been entitled to.

The next question is, what interest or share was limited over to Mrs. Kean by way of executory devise in the one third of the land given to J. B. Macomb, and what portion to the nephews and nieces of Mrs. Clayton, the sister of the testator? This depends upon the construction of the language used by the testator in his will. Was it his intention that they should take *per capita* or *per stirpes*?

There are some rules well established in construing wills, to which it may be useful to refer.

The intention of a testator is to be collected from the will itself, taking in aid the general rules of construction which have been settled by decision. In construing wills, courts are bounded by the words it contains—of the words used they are to declare the plain meaning; if they should adopt a different course they would become the makers, instead of the expounders of the will: 2 Ves. & Bea. 271;¹ 1 Eden, 43.²

We may privately think that this or that was the intention of the testator, but we are not at liberty by private opinion to establish a construction which is against the plain words of a will, or to give to words a meaning contrary to that which has been assigned to them by legal adjudication: 1 Atk. 273, 274; 1 Yeates, 439.³

When a testator uses technical words, or words which have received a settled legal sense, courts are bound to say *prima facie*, that he understood the meaning of them, and others are not to be substituted, unless by express words, or from the context; or by an unavoidable and necessary construction it plainly appears that it was intended that the words should be construed or used otherwise, or unless it becomes necessary to do so in order to make sense of the will: 3 T. R. 493;⁴ Doug. 341;⁵ 1 Yeates, 343;⁶ 5 Ves. 401,⁷ 402; 2 Ball & B. 204;⁸ 11 Wend. 279,⁹ 293.

If words be used in a will which have received a settled construction, an established definite meaning by express adjudication, such construction should, for the sake of uniformity in the disposition of real estate, and for the security and repose of society, be adhered to by courts of justice, unless it violates the plain undoubted meaning of the instrument: 2 P. Wms.

1. *Noel v. Weston.*

2. *Stephenson v. Heathcote.*

3. *Torbett v. Toining.*

4. *Comberbach v. Perryn.*

5. *Hodgson v. Ambrose.*

6. *Evans v. Davis.*

7. *Holloway v. Holloway.*

8. *Winslow v. Tigue.*

9. *Paterson v. Ellis.*

741;¹ 3 Oranch, 134;² 8 T. R. 66;³ 5 Mass. 501;⁴ 4 Kent Com. 539.

Lord Eldon, in the case of *Lady Lincoln v. Pelham*, in 10 Ves. 166, says, with great propriety, "if there is a settled construction founded on cases decided, applying to the terms used, it is better to adhere to that settled construction, though I may entertain some doubt whether it is according to the intention, rather than upon some grounds on which I can not rest on every view of the case, to come to a decision having a tendency to shape that which forms a rule of construction, and which may in practice have been acted on in many cases."

With this conclusion of Lord Eldon we accord, and if there be a well-settled legal construction of the words and language which have been used by Thomas J. Macomb in his will, we hold it better to adopt that construction, although we may have some doubts, if such be in strict conformity with the intention and mind of the testator when he executed this will.

There are two rules of construction recognized and established by decision, either of which when applied to this will, leaves no doubt in our minds as to what should be the true legal determination of the question before us.

.. Whenever property is devised to children and grandchildren, or to brothers and sisters and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take *per capita* and not *per stirpes*. When the devise is to them by name, they take in their own right, and not as the representatives of another: the devise is made to them *nominatim*; they are *personae designatae*, and they claim not as representing their ancestor, although in the will as a *descriptio personae* they may have been distinguished as his children, but in their own right, inasmuch as the testator has named them specially and personally, as those who have the legal, personal, and individual right to the benefit conferred by the will. In the case of *Blackler v. Webb*, in 2 P. Wms. 383, the attorney-general in his argument, contended that the construction of the will must be the same as "if the testator had particularized each grandchild by name, as John, Thomas, etc., when he said there could be no question but that the grandchildren must have taken *per capita*, and not *per stirpes*." This principle was not denied by the opposing counsel, and Lord Chancellor King expressly admits its correctness, for he decreed in the case then before him, that the children and grandchild-

1. *Cowper v. Cowper*.

2. *Lambert v. Paine*.

3. *Shild v. Wright*.

4. *Ida v. Ida*.

dren "should each of them take *per capita*, as if all the grandchildren had been named by their respective names." The lord chancellor recognizes the rule of law as one fixed and established, that the devisees take *per capita* and not *per stirpes*, if they be named by their respective names.

In *Phillips v. Garth*, 3 Bro. C. O. 68, 69, which was the case of a bequest of the residue to the next of kin, it appears that this principle was, by the counsel on both sides, acceded to as a settled one, and about which there could be no controversy. Justice Buller, who sat in that case for the lord chancellor, in delivering his judgment, says: "It is agreed that if he, the testator, had given it to his next of kin by name, they must have taken *per capita*." The applicability of this rule, which we consider to be one fully established, to the case before us, is apparent when we examine the will of Thomas J. Macomb. He devises all his real estate to his sister Elizabeth, to his brother James, and to his nephews and nieces, "Joshua Clayton, Elizabeth Clayton, Jennet Clayton, and Henry Clayton, children of my late sister Jennet Clayton, in the proportions and manner and under the restrictions following, that is to say," etc. In this first clause of his will, in which he devises his real estate, he specially names all the devisees who are to partake of it; his nephews and nieces, as well as his brother and sister. He then proceeds to fix the proportions they respectively shall take, and when he comes to dispose, by way of executory devise, of the third devised to his brother, in the event of his dying without issue, and which third part is the subject of the present action, he devises it "to be equally divided between my sister Elizabeth and my said nephews and nieces, their heirs and assigns forever, as tenants in common." The devise is to his said nephews and nieces—that is, those whom he had previously designated, and whose names he had given, viz., Joshua, Elizabeth, Jennet, and Henry, to be equally divided between them and his sister. By this specific reference to his nephews and nieces, whom he had previously named, they are as fully, individually, and personally designated in reference to this third part, as if their names had been again repeated in connection with this third, and the construction of this devise must be the same as if the names had been so repeated.

The devise in this will is not to the issue or children of the late Mrs. Clayton, but to four of her children, whose names are given; and it may be remarked, as to the devise of the third now in controversy, the name of Mrs. Clayton does not appear

in any way in connection with it. Mrs. Clayton might have left other children. Had such been the fact, could such other children have claimed a portion of this third part? Surely not. And yet, if the claim of these children of Mrs. Clayton is *per stirpes*, a representative one, all her children would be entitled. The stock could not be represented if one child was excluded.

2. The other rule to which we had reference as decisive of the questions in this case is this: The settled legal construction of the words, equally to be divided, when used in a will is to cause an equal division of the property *per capita* and not *per stirpes*, whether the devisees be children and grandchildren, brothers or sisters and nephews and nieces, or strangers in blood to the testator: 1 Bro. C. C. 31;¹ 3 Id. 64;² Talb. 251.

In the case of *Buller v. Stratton*, 3 Bro. 367, the testator bequeathed the sales of certain property to be divided equally between B. C. Stratton, John Stratton, and the children of Mary Patterson. Mary Patterson had four children, and the question was, whether the legacy should be divided *per stirpes* or *per capita*, and it was ruled by Lord Thurlow, that the division should be *per capita*.

Lord Eldon, in the case we have before referred to, of *Lady Lincoln v. Pelham*, in 10 Ves. 176, says, when speaking of this rule, "It has been applied to many instances upon which doubts have been strongly raised—for instance, a gift to a brother and the children of a deceased brother, who without a will would take *per stirpes*: yet it has been held that though the law would have given it in moieties, that is not the effect of an express bequest;" and after decreeing a distribution *per capita*, his lordship adds—"whatever the actual intention may have been, the legal effect is a distribution *per capita*; and I can not safely draw an inference from the other parts of the will, introducing distinctions tending to shake the settled doctrine."

In the case of *Lugar v. Harmon*, 1 Cox, 250, the testator bequeathed the residue of his estate to be equally divided amongst all and every the child and children of his late cousin, Edward Lugar and his cousin Philip Fearis, and their lawful representatives, and Lord Kenyon, then master of the rolls, decreed one fifth of the residue to Philip Fearis, and a fifth to each of the four children of Edward Lugar.

In *Northey v. Strange*, 1 P. Wms. 341, there was a bequest by a freeman of London, of one moiety of the surplus of his personal estate to his son A., and the other moiety to his children

1. *Garth v. Mayrick*.

2. *Phillips v. Garth*.

and grandchildren, and it was ruled by Sir John Trevor, master of the rolls, that the children and grandchildren should take, *per capita* and not *per stirpes*; they all taking in their own right, and not by way of representation.

Blackler v. Webb, reported in 2 P. Wms. 383, and to which we have heretofore referred, is a prominent case in relation to the rule we have stated. S. Bagwell having had several children, some of whom were dead and others living, by his will bequeathed the surplus of his personal estate equally to his son James, and to his son Peter's children, to his daughter Traverse, and to his daughter Webb's children, and to his daughter Mann. The question was, whether the children and grandchildren should take *per capita* or *per stirpes*. It was urged for the children that the distribution should be by stocks, as it was not probable that the testator should intend his own children to take no greater share of his estate than each of his grandchildren, who were of tender years, and would require but a small expense for their maintenance and subsistence. But Lord Chancellor King decreed that the three children of the testator, James, Traverse, and Mann, and the children of Peter, who was dead, and the children of Mrs. Webb, being in all fourteen in number, should each take *per capita*, as if all the children had been named by their respective names. He held, that the grandchildren could not take according to the statute of distribution, or in allusion thereto, as the testator's daughter, Webb, was living, and her children could not, therefore, represent her: and that it would be to go too much out of the will, and contrary to its words, to determine that the grandchildren should take *per stirpes*, when the meaning of the testator might be according to his words, and that meaning a reasonable and sensible one.

By the terms of the will of Thomas J. Macomb, the third part of the real estate on the death of James B. Macomb without issue, is "to be equally divided between the testator's sister Elizabeth and his said nephews and nieces, their heirs and assigns forever, as tenants in common." The words used in this will, "equally to be divided," have received a settled legal construction in courts of justice, as appears from the cases to which we have referred, and many others which might be cited; that is, an equal distribution *per capita* amongst the different legatees; and that too in cases in which it might well be doubted if such was the intention existing in the mind of the testator, as in the case of a father devising to a living son and the

numerous offspring of a deceased child; and a brother devising to a sister and the children of a deceased sister. The first and natural impression would be in such cases that the testator meant, that his son and the children of his deceased son, or the sister and her nephews and nieces, should take in equal moieties, as the law would apportion it in cases of intestacy, and not that the son or sister should receive only a share *per capita*, an eighth or tenth part of the estate, according to the number of children left by the deceased son or sister, and each grandchild or nephew take as much of the estate as the son or sister; and yet in these cases the law is settled beyond all doubt, that if by the will the fund is to be equally divided, the son or sister takes no larger share than one of the grandchildren, or nephews or nieces, unless there be something in the will plainly and explicitly controlling and overruling the established and legal sense of these words. A testator in using such technical words—words whose legal import is settled—is presumed in law to have understood and used them in their established legal sense (unless from the will itself, or something to which it refers, the contrary clearly and satisfactorily appears), and the legal operation of such words thus used must prevail.

In adhering to an established rule, and giving to words that construction and sense which adjudged cases have assigned them, courts of justice pursue the safe course, and render secure the tenures and disposition of property. Where landmarks have been long fixed, it is for the common interest of society that they should be upheld and strengthened, rather than that their foundation should be weakened or in any manner impaired. The different provisions in this will, and the particular circumstances of this case, may be such as to raise doubt and conjecture as to the intention; but the inference arising from them is not such (as was said by Lord Eldon, in 10 Ves. 176) as can overpower the settled construction of the words used by the testator. They are not of that plain, strong, conclusive, or overpowering character.

It is urged on the part of the plaintiff, that the provision in the will of Thomas J. Macomb, in relation to the legacies of five hundred pounds given to each of his sisters, by the will of Thomas Irons, and charged by the latter will on the land devised to Thomas J. Macomb, is of a character to control the legal operation of the language used by Thomas J. Macomb in his will. The argument is, that the legacies given to the sisters by the grandfather, were equal in amount; that Thomas J.

Macomb intended the devises in his will to his sister Elizabeth, and the children of his sister Jennet, to be in payment of those legacies; and therefore, that the court must infer or presume that the brother intended to give his sister Elizabeth, and the children of his sister Jennet equally of his estate, as the legacies of the sisters were equal, and they by his will, excluded from any claim for those legacies.

Such an inference, we think, can not be drawn from this will. It is true the legacies to the sisters from their grandfather were equal, and charged on the land devised by him to Thomas J. Macomb, but we can not presume that the latter designed the sisters or their children to take equal parts of his estate in satisfaction of those legacies, when the will plainly and expressly shows that he did not intend that they should partake of his estate equally. While single, Elizabeth, the sister, was to have one half of the real estate, and the nephews and nieces only a fourth. To infer equality of interest under this will, because the legacies from Thomas Irons to the sisters were of the same amount, would be to violate the plain language and clear and undoubted design of Thomas J. Macomb. Such a construction would reduce the share of Elizabeth, even while single, from a half to a third of the estate; though it is manifest, beyond all question, that her brother intended that while single she should hold the one half of his estate, and his nephews and nieces but a fourth. We, therefore, can perceive nothing in this provision of the will, taking in connection with it the will of Thomas Irons, that can, in our judgment, control the established construction and legal sense which judicial decisions have assigned to the words used by T. J. Macomb, in his will. It will be remarked, too, that the provision by T. J. Macomb as to these legacies, is not expressly in satisfaction or payment, but in bar; for the language he uses is, that the devises to his sister and nephews and nieces are to be in lieu of the principal and interest (if any) of those legacies. There is no distinct admission that the whole or even any part is unpaid. His design was to bar any claim on his estate grounded on these legacies. *

These nephews and nieces had no claim to the legacy given their mother by her grandfather. If unpaid, it belonged to their father, who is still living, and he might, after the death of Thomas J. Macomb, have recovered this legacy from his estate; and his children, the nephews and nieces of the testator, would not by that act have been debarred from enforcing their claim

to the interest in the real estate of T. J. Macomb, devised them by his will, notwithstanding such recovery.

The precise disposition which it was designed to make of the third part of the land devised to James B. Macomb, in case he died without issue, is a matter of conjecture; of inference; and, indeed, of considerable doubt: for we find in one part of this will the testator providing, that in the event of James dying, and leaving no issue who shall be living at the time of Elizabeth's marriage, then her "life estate" is not to cease. Why this provision securing to Elizabeth, after the death of James without issue, a continuance of a life estate in the moiety of the land, if he intended that on the death of James without issue, she should have a fee in the moiety? It is manifest from the will, that the testator intended, if his brother died without issue, his nephews and nieces were to take the one half of his real estate whether Elizabeth married or remained single. But it is not equally clear that he intended if Elizabeth married, she should then be entitled to the one half, or that these nephews and nieces should not have a right to more than the one half. In the absence, therefore, of a plain and explicit intention, the safe rule is to adopt the settled legal interpretation of the language the testator has employed. It may have been, and most probably was, the design of the testator to place his sister, and the children of his deceased sister, on an equality, if his brother died without issue. But whatever his actual intention may have been (and it is and must remain one of conjecture and at least of some doubt), the legal effect of the language used by him in devising over the interest which had been given to James, as established by repeated decisions, is to prevent that equality, and to vest in his sister Elizabeth, and in each of his nephews and nieces, an equal share of that interest.

By the will that interest, which is a third part of the land, was to be divided equally between Elizabeth Macomb (afterwards Mrs. Kean), Joshua Clayton, Elizabeth Clayton, Jennet Clayton, and Henry Clayton; that is, according to the established sense of these words, the share of each of these five devisees was to be equal. It could not be "divided equally," as the will directs, unless each devisee received a share equal to that of each of the other devisees. According to our judgment, we should unsettle the established doctrine of courts of justice, if we should undertake to draw from the other parts of this will, an inference, for it could be nothing more, which would annul or render inoperative, the plain legal language in which the

devise in question is couched. We do not feel at liberty, as was said by the master of the rolls, in 8 Vesey, 42, by inference or argument from other parts of the will, to control the effect of a positive bequest. But we hold it to be our duty to apply the rule in 6 T. R. 352:¹ "In construing a will to give effect to the devisor's intention, as far as we can consistently with the rules of law, not conjecturing, but expounding his will from the words used. And where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; for that would be, as Lord King and other judges have said, removing landmarks."

Judgment. And now, to wit, this, etc., this cause coming on to be heard by and before the court here, and the same being debated by counsel on both sides learned in the law, and this court having heard and considered the questions of law which were directed to be heard before this court, it is considered and adjudged by the court here, that upon the death of the said James B. Macomb, the said Matthew Kean took and became entitled only in and to an undivided fifth part or share of and in the said third part of the said lands and premises in the case stated mentioned, which said third part the said James B. Macomb took, and became entitled to, under the said will of the said Thomas J. Macomb; and it is further ordered by the court here, that the record and proceedings in this cause be remanded to the superior court of this state, in and for Kent county.

A DIVISION PER STIRPES was ordered in *Roome v. Counter*, 10 Am. Dec. 390, in the case of a legacy directed by the testator to be divided equally among his surviving children and "the heirs" of a deceased son. In that case, *Blackler v. Webb*, 2 P. Wms. 383, much relied upon in the principal case, was doubted, but subsequent cases in the same state, New Jersey, have recognized the authority of that case: See note. When a devise is to "heirs" of several, and it is evident that the word "heirs" is used as a *designatio personarum*, the division among the persons answering to the description is *per capita*: *Ward v. Stowe*, 27 Id. 238.

THE INTENTION OF A TESTATOR is to be sought from the terms of the will, not *aliunde*: *Theall v. Theall*, 28 Am. Dec. 501. The intention is to be gathered from the whole of the will taken together; no part thereof should be rejected when operation may be given to it consistent with the testator's general intent: *Covenhoven v. Shuler*, 21 Id. 74, and prior cases in this series collected in note thereto.

1. *Lane v. Stanhope*.

CASES
IN THE
COURT OF CHANCERY
OF
DELAWARE.

BAILEY v. KENNEDY ET AL.

[2 DELAWARE CH. 12.]

A CONVEYANCE BY A DEBTOR in satisfaction of a debt due by him, will be overreached in favor of other creditors, where the value of the property conveyed greatly exceeds the amount of the debt, the satisfaction whereof was the consideration of the conveyance.

PROPERTY CONVEYED TO A DEBTOR under such circumstances will, in equity, be deemed security, first to the grantee, and after he has received satisfaction therefrom, then for the other creditors.

SEPARATE CREDITORS OF THE MEMBERS OF AN INSOLVENT FIRM are entitled to the separate property of their debtors, and only the surplus left after satisfying them can be applicable to the discharge of the partnership debts.

BILL to set aside a conveyance. The conveyance had been made sixteen years previously, and an accounting of the rents and profits was demanded.

J. A. Bayard, for the plaintiffs.

G. Read, jun., contra.

JOHNS, Jun., Chancellor. The complainants are creditors of the late firm of Kennedy & Denning. They have proceeded at law to judgment. The firm being insolvent, and also the individual members, these creditors seek relief in equity, by impeaching, on the ground of fraud, a conveyance made by Kennedy of a part of his real estate to his sister, Margaret Kennedy, now Margaret Talmadge. The grantee took the conveyance in payment and discharge of a separate debt, the grantor conveying his separate property. The consideration for the entire property conveyed was the balance ascertained by the proper officer to be

due from Kennedy, as the guardian of his sister, on the settlement of his guardian account, to the amount of three thousand seven hundred and seventy-eight dollars and fifty cents.

The conveyance was of a life estate in Kennedy in a farm situated in St. George's Hundred, in the state of Delaware, by deed, dated June, 1820, for the express consideration of three thousand dollars. The annual rental value of this farm may be taken upon the proof to have been six hundred dollars. The property in Maryland appears to have comprised two dwelling-houses and a farm. The two dwelling-houses were worth together, a rental of twenty-four dollars per annum, and the farm was worth ninety-five dollars per annum. Thus the total annual value of the property conveyed may be set down at seven hundred and nineteen dollars. The annual interest upon the debt due from Kennedy as guardian, would be about two hundred and twenty-six dollars, which sum being deducted from the annual rental of seven hundred and nineteen dollars, leaves four hundred and ninety-three dollars, as the excess of rent over interest. This sum if regularly applied would, in sixteen years, be sufficient fully to discharge the debt due from the guardian, and leave a considerable surplus, not less in amount than the sum of four thousand dollars.

I have gone into this calculation, only to ascertain the effect and operation of this conveyance by Kennedy to his sister, supposing the possession of Kennedy to have been consistent with the deed.

The conveyance in this case, being prior to the act of assembly relative to assignments by debtors, is not affected by the provision of that act which avoids any preference among creditors given by a debtor in contemplation of insolvency. At the time when the conveyance in this case was made, a debtor had the power to prefer any creditor; but all such transfers of property as modes of payment must necessarily be subject to the consideration of relative value. They were allowed, prior to the act of assembly, upon the principle that a debtor had a right to apply his property in discharge of his debts; and as he might confess a judgment and thus give a preference to one creditor, he was allowed by assignment to transfer his property for the benefit of his creditors, and in such mode of conveyance to prefer any creditor. As the whole proceeding is based on the principle of payment, it would be wrong to extend it so as to allow a debtor to convey all his property to a single creditor, if it greatly exceeds in value the amount of the debt due. For,

by so much as the property conveyed exceeds in value the debt, it would be a gift, a mere gratuity, a voluntary conveyance—and, if permitted to stand, it would enable the debtor to place his property out of the reach of his creditors, except the one he chose to prefer, and with whom he might, by collusion, so arrange matters as to enjoy all the benefits of the fraud. Hence, in all transfers like the present, which is not an assignment in trust for the benefit of creditors, but an absolute conveyance, it is essential to consider the value of the property conveyed and for which the debt is the consideration. If it greatly exceeds the amount due, then, as to such excess, the other creditors have an interest, and are entitled to have the excess applied in discharge of their debts. This is effected in equity by considering the property conveyed as a security—first, to the grantee, and on his being fully paid, then that the balance be applied to the other creditors.

As I am of opinion in this case that the value of the property conveyed greatly exceeded the amount of the debt due; and considering also that the circumstances attending the transaction are suspicious, I shall direct an account, as prayed for by the bill. It should be observed, however, that this was the separate property of Kennedy, and that the complainants are proceeding to collect a partnership debt. The separate creditors of Kennedy must be allowed to come in and be first satisfied before the fund arising from the separate property can be applicable to partnership debts due from Kennedy and Denning.

SEPARATE PROPERTY OF PARTNERS, LIABILITY OF: See note to *Grossner v. Austin*, 25 Am. Dec. 745.

AM. DEC. VOL. XXIX—23

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

LEIDIG v. RAWSON.

[1 SCAMMON, 272.]

APPARENT VARIANCE between an instrument introduced in evidence from the one set out in a pleading is obviated by the failure of plaintiff to object to its introduction, such failure being deemed a confession that the instrument in evidence is relevant to the issue.

MALICE AND WANT OF PROBABLE CAUSE must concur to support an action for malicious prosecution.

A VARIANCE BETWEEN AN INSTRUMENT offered in evidence from that set forth in the pleadings, where this latter is not of the foundation of the action, is immaterial unless it be of such character as to cause a strong probability that the two instruments are not identical.

A PROSECUTOR IS NOT LIABLE for an indictment brought in by the grand jury, if that body found it in disregard of his evidence; as would be the case were they to find an indictment for one offense when the prosecutor's evidence before them was to the commission of another.

MALICIOUS PROSECUTION—WHAT EVIDENCE INADMISSIBLE TO SHOW WANT OF MALICE.—Where a witness was asked whether the prosecutor in an indictment for perjury, defendant in the present action for malicious prosecution, had not understood himself to have been prosecuted for larceny by the plaintiff, in a prior proceeding instituted against him by the latter, in a justice's court, the question was held improper; although the indictment for perjury was obtained because of the plaintiff's oath made in that proceeding.

TRESPASS on the case. The case appears from the opinion.

A. Cowles and J. Semple, for the appellant, defendant below.

H. Eddy, J. S. Greathouse, and S. T. Sawyer, contra.

By Court, Lockwood, J. This was an action of trespass on the case, commenced by Rawson against Leidig, in the Mont-

gomery circuit court, for maliciously indicting Rawson for perjury. The defendant below pleaded not guilty. On the trial of the cause, Leidig read in evidence to the jury, without objection, an affidavit made before Josiah Wright, esq., a justice of the peace for Montgomery county, by Daniel Rawson, in the words following, to wit:

“ March third day, in 1834, the people of the State of Illinois against John Steerman and George Leidig and Henry Bloodner. Whereas Daniel Rawson, of Bond county, and state of Illinois, personally appeared before me, a justice of the peace in and for the county of Montgomery, and state of Illinois, and made oath that the above-named John Steerman and George Leidig and Henry Bloodner did forcibly take away two yoke of oxen, and other articles, which I believe I had an interest in:”

Which being read to the jury, Leidig's counsel offered to give evidence to prove that Rawson, in making said affidavit, swore falsely; but the court decided that such evidence should not be given to the jury. To which opinion the defendant excepted. The following exceptions were also signed on the trial, to wit: “ That defendant called J. A. Wakefield, esq., who was counsel for George Leidig, before Josiah Wright, esq., on third of March, 1834, in the prosecution of the People against Leidig and others, to prove that Leidig understood that case to be for larceny in taking Rawson's oxen, and proposed this question: ‘ Did the defendant, Leidig, understand on the trial before Justice Wright, that he was answering to a prosecution for stealing the oxen?’ which was objected to by the plaintiff, and the objection sustained by the court.”

The refusal of the court to permit the defendant to give evidence to prove that Rawson in making the affidavit swore falsely, and the decision of the court in refusing to receive the testimony of Wakefield, are assigned for error.

The questions arising out of these bills of exceptions, will be examined in their order. The reason why the circuit court refused to permit the defendant to prove the affidavit of the plaintiff to be false, is not stated in the bill of exceptions. It is however fairly to be presumed, that it was because there was a variance between the affidavit read on the trial, and the oath alleged in the indictment to have been taken by Rawson before the justice; the making of which oath, was the foundation of the indictment for perjury. If the variance was the cause of rejecting the testimony to prove its falsity—and no other reason appears probable—the court below erred. The

affidavit being read without objection, was an implied admission on the part of the plaintiff, that it was the affidavit or oath that was before the grand jury, as the basis of the indictment against him. For what purpose did Leidig offer this affidavit to the jury, as part of his defense, unless to show the grounds he had for prosecuting Rawson for perjury? The court can perceive no other object, and the plaintiff not objecting to it, is precluded from denying that it was relevant to the point in issue.

In actions for malicious prosecutions, it is a rule of law, that there must be both malice and a want of probable cause, to justify a recovery. This rule of the law is founded upon principles of public policy: 2 Stark. Ev. 911, and authorities there cited. The defendant may give in evidence any facts which show that he had probable cause for prosecuting, and that he acted in good faith, upon the ground of suspicion: *Id.* 916.

But conceding that there is a variance between the affidavit read, and the oath mentioned in the declaration, and that the plaintiff had objected to the reading of the affidavit, ought the objection to have prevailed? The rule of law applicable to variances, is, that whenever an instrument of writing or a record is not the foundation of the action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it can not be the instrument or record described. Test this affidavit by this rule.

It is to be observed that it is not stated in the indictment, whether the oath administered by the justice to Rawson, was or was not in writing. The oath mentioned in the indictment, and the affidavit, were both made before the same justice, and on the same day. The prosecutions in both were carried on in behalf of the people. The indictment alleges that Rawson charged Leidig with feloniously taking two yoke of oxen, two plows, and two log chains, the property of Rawson. The affidavit states that Leidig and others did forcibly take away two yoke of oxen and other articles which Rawson believed he had an interest in. From this comparison of the two statements, no doubt can exist that they both refer to the same transaction. For what object could Rawson make his complaint to the justice, on oath, but to charge Leidig with stealing his oxen and other articles? The justice could not try an action of trespass for taking the oxen, as their value, with the other articles, was much beyond a justice's jurisdiction. Had Rawson intended to institute a civil action against Leidig, no oath would have been necessary. The complaint that was exhibited

in the affidavit before the justice of the peace, was substantially, though not technically, a charge that Leidig had feloniously stolen the oxen and other articles, and so, doubtless, the justice and Rawson considered the matter when the oath was administered and the warrant issued. The language used in the indictment, is that of the grand jury and the prosecuting attorney, and for which Leidig, as the prosecutor, is not responsible, if he stated nothing but facts, however great the variance may be between the language used in the indictment, and the facts sworn to by the prosecutor. To illustrate this position: Suppose A. goes before the grand jury, and swears that B. has stolen his goods. The grand jury, however, find a bill for robbery. On the trial, B. is acquitted because the charge is not proved as laid. B. then brings his action against A. Would it not be competent for A. to show that he only complained against B. for larceny, before the grand jury, and that B. was guilty of the larceny charged? Certainly he could; for the gist of the action for malicious prosecution, is, that the prosecutor acted maliciously, and without probable cause. If there is no malice, or if there is probable cause, the action will not lie. The mistake of the grand jury, in finding a wrong bill, can not make a party liable who has acted in good faith.

Again, suppose Leidig in entering his complaint to the grand jury, had exhibited the affidavit above referred to, and complained that Rawson in making that affidavit, had sworn falsely; yet the grand jury had found the bill of indictment described in the declaration, and on the trial of the indictment, Rawson was acquitted, because the court decided upon the production of the affidavit, that no such false oath had been taken, as the one set forth in the indictment; would it not be competent for Leidig on the trial of an action for malicious prosecution, to show that there was falsehood in the affidavit? It clearly would. The court are therefore of opinion, that circumstanced as this case was, the circuit court erred in refusing to permit Leidig to prove the falsity of the affidavit read on the trial. We are also of opinion that the circuit court decided correctly in refusing to permit Wakefield to answer the question asked him. Had the question been whether he, as counsel of Leidig, had informed him that he was prosecuted for larceny, the question would have been proper as part of the *res gestæ*. It might have tended to show the absence of malice: 2 Stark. 922.

The judgment of the circuit court is reversed with costs, and

the cause remanded with directions to the circuit court of Montgomery county, to award a *venire de novo*.

Judgment reversed.

The doctrine of the principal case, that where an instrument is not the foundation of an action a variance is immaterial, unless the discrepancy is so great as to amount to a strong probability that the instrument offered is not the one described, was approved in *Hull v. Blaisdell*, 1 Scam. 334; *Plumleigh v. Cook*, 13 Ill. 670; *Stevison v. Earnest*, 80 Id. 519. To the effect that malice and want of probable cause must concur, the principal case was approved of in *Mitchinson v. Cross*, 58 Id. 370; *Barrett v. Spaid*, 70 Id. 410. In *McBean v. Ritchie*, it was cited as an authority to the effect, that from an acquittal upon a criminal charge, the law will not presume want of probable cause for the prosecution.

WHAT VARIANCES ARE IMMATERIAL between the records set out in the pleadings in actions for malicious prosecution and those introduced in evidence: *Adams v. Lisher*, 25 Am. Dec. 102; *Mowry v. Miller*, 24 Id. 680; *Miller v. Brown*, 23 Id. 693.

MALICE AND WANT OF PROBABLE CAUSE must concur to support an action for malicious prosecution: *Adams v. Lisher*, 25 Am. Dec. 102; *Turner v. Walker*, 22 Id. 329, and note page 337.

THORNTON v. DAVENPORT.

[1 SCAMMON, 296.]

A MORTGAGE OF PERSONAL PROPERTY WILL NOT JUSTIFY THE INFERENCE OF FRAUD, from the other fact proved, that it was made on the day that a judgment was obtained against the mortgagor.

DEED UPON VALUABLE CONSIDERATION does not come within the provisions of the statute of frauds and perjuries.

CONVEYANCES OF GOODS AND CHATTELS WHERE POSSESSION IS RETAINED by the vendor, are fraudulent *per se*, unless such retention be consistent with the object, intent, and stipulations of the deed of conveyance.

A BONA FIDE MORTGAGE OF PERSONAL PROPERTY, though the possession is not changed, is valid against all persons, if by the stipulation of the mortgage it is provided that possession shall be retained by the mortgagor until the maturity of the mortgage debt.

THE case appears from the opinion.

S. Breese and Wm. Thomas, for appellant, defendant below.

J. Lamborn, *contra*.

By Court, WILSON, C. J. By agreement of the parties, this case was submitted to the court upon a statement of facts, accompanied by a deed of mortgage made by Wilhite to Thornton. By this deed, Wilhite conveys to Thornton a variety of personal property, for two hundred dollars, with a condition,

that if Wilhite will pay to Thornton, at maturity, a note of two hundred dollars, with twelve per centum interest in one year, then the deed is to be void, otherwise absolute. It is also stipulated that Wilhite is to retain possession, and to have the use of the property until the day of payment. He is, also, at his own expense, to keep the property (part being live stock), and at the expiration of the year, if the debt be not paid, deliver it up to Thornton in good condition. The facts agreed upon, are, that Wilhite was indebted to Thornton in the sum of two hundred dollars, the amount for which he executed his note, and that the mortgage was made to secure this debt. Davenport and Henderson were also creditors of Wilhite, and on the same day that the mortgage was made, obtained a judgment against him, and soon after, but before the expiration of the year, levied their execution on the mortgaged property in the possession of Wilhite.

Upon this statement of the case, the court below decided the deed from Wilhite to Thornton to be void as to the creditors of Wilhite, and consequently subject to the execution of Davenport and Henderson. To support this position, it must be shown that the transaction between Wilhite and Thornton was fraudulent in fact, or that the conveyance is of such a character that the law will imply fraud; and that countervailing testimony of fair intention, will not redeem it from this inference. That the sale from Wilhite to Thornton is not fraudulent in fact, is apparent from a consideration of all the circumstances attending the transaction, as admitted by the parties. The sufficiency of the consideration upon which the mortgage was made is not questioned. It is admitted that Wilhite was indebted to Thornton in the sum of two hundred dollars, and that the property mentioned in the deed was mortgaged to secure this debt. The only circumstance of a questionable character is, the execution of the mortgage on the same day of the rendition of the judgment against him, in favor of Davenport and Henderson. But this fact unaccompanied by any other circumstance calculated to cast suspicion upon the transaction, is not of itself sufficient to attach to it the imputation of fraud, and thereby taint and render void the whole transaction. The transfer to Thornton, in its most unfavorable aspect, only amounts to a preference of one creditor to another; a privilege to which the debtor is always entitled. Even an insolvent debtor may prefer one creditor to another, and his motives for so doing, provided the preferred creditor has done nothing im-

proper, can not be inquired into; nor is the time when this preference is indicated, material, provided it is anterior to the lien set up to avoid it: *Marbury v. Brooks*, 7 Wheat. 556; 5 Pet. Cond. R. 345; *Spring et al. v. S. C. Ins. Co.*, 8 Wheat. 268; 5 Pet. Cond. R. 434.

There being no circumstances then attending the conveyance of the property from Wilhite to Thornton, from which fraud in fact can be inferred, it becomes necessary to inquire whether it is alike free from the inference of fraud in law. In the argument of the case, the statute of frauds and perjuries was adverted to; but as the deed under review was made upon valuable consideration, it does not come within the provisions of that statute. The case, therefore, depends entirely upon the principles of the common law; and it is to be regretted that the judicial determinations relative to the rules governing the transfer of personal property, which are of so much importance, and such general application, have not been more stable and definite. But while the decisions of the courts of several of the states have been vacillating and discordant, those of England, as well as those of a large majority of the states, have been uniform and consistent; and the principle well established by those decisions, is, that all conveyances of goods and chattels, where the possession is permitted to remain with the alienor or vendor, is fraudulent *per se*, and void as to creditors and purchasers, unless the retaining of possession be consistent with the deed, as in case of an absolute, unconditional sale, where the possession does not "accompany and follow the deed." Here the vendor's possession is not merely evidence of fraud, but, by legal inference, is a fraud *per se*, and can not be rebutted by testimony of fair intention; because the possession not remaining with the person shown by the deed to be entitled to it, works deception and injury. But where, from the nature and provisions of the conveyance, the possession is to remain with the vendor, and the transaction is *bona fide*, its so remaining is consistent with the deed, and does not avoid it.

The application of these principles to the present case, will clearly establish the validity of Thornton's title to the property in controversy. The conveyance from Wilhite was a mortgage, the legitimate object of which was to secure to a creditor a just debt; and it was expressly stipulated in the deed that Wilhite should retain possession of the mortgaged property, until the debt became due. Had not the deed contained this authority for his possession, there is no doubt but his retaining it would

have constituted a legal fraud. Such too would have been the effect of his remaining in possession, if the deed to Thornton had been an absolute, in place of a conditional one, though authorized by its terms. In the first case his possession would not be authorized by the deed; and in the other, it would be inconsistent with its character, and therefore void. Neither of these objections, however, applies in this case. Wilhite's possession of the property is consistent with the object and intent of the deed, and is warranted as well by its stipulations as by its usual and legal operations; for it is of the nature of a security that the debtor should retain possession until the day of payment be past.

Among the numerous authorities from which these principles are deduced, there are several cases directly analogous to the present, such as the case of *Cadogan v. Kennet*, Cowp. 432, where by settlement before marriage, the husband conveyed all his household goods to trustees, to the use of himself for life, with remainder over, and with a proviso that he should retain possession and enjoy the property; his doing so, the court said, being consistent with the object, intent, and provisions of the deed, did not render it void.

Such too was the decision in the case of *Claybourn's Executors v. Hill*, 1 Wash. 177 [1 Am. Dec. 452], which was the case of a mortgage of personal property, with an express stipulation that the debtor should retain possession. The only deduction from these and numerous similar cases, is, that mortgages, marriage settlements, and limitations over of chattels, are valid against all persons, without delivery of possession; provided the transfer be *bona fide*, and the possession remain with the person shown by the stipulations of the deed to be entitled to it. Were a different rule to prevail, one which would not under any circumstances sanction the separation of the title to personal property, from the possession, it would, in many cases, render the transfer of personal property to suit the convenience of parties, extremely inconvenient, and, in some cases, impossible; as where from the situation of the property at the time, it is as incapable of delivery; as in the case of a sale of a ship at sea, or the limitation over of chattels, after the use of them for life or for years, to another. I admit that there are some authorities which seem to militate against, and others that are less equivocally opposed, to the rule here laid down, which permits the possession of personal property, in cases like the present, to be separated from the title. But I think the prin-

ciple so well established by an overwhelming current of authorities, that no arguments drawn from policy, will justify the court in departing from it.

The judgment of the circuit court is therefore reversed, with costs.

Judgment reversed.

Lockwood, J., dissenting. I can not concur in the opinion of the court, because I believe that where the motive for the sale or mortgage, is the security of the vendee or mortgagee, and the vendor or mortgagor is permitted to retain the possession and visible ownership for the convenience of the parties, it is a fraud, though the arrangement be inserted in the deed or mortgage. The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stay to inquire whether there was actual fraud or not; it will infer it at all events; for it is against sound policy to suffer the vendor or mortgagor to remain in possession, whether an agreement to that effect be or be not expressed in the deed. It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is thereby enabled to practice deceit upon mankind. If the possession be withheld pursuant to the terms of the agreement, some good reason for it, beyond the convenience of the parties, must appear; and the parties must leave nothing unperformed within their power to secure third persons from the consequences of the apparent ownership of the vendor or mortgagor. In support of my views on this subject, I have used the language of Chancellor Kent, commenting on the case of *Clow v. Woods*, 5 Serg. & R. 277 [9 Am. Dec. 346]. In that case the supreme court of Pennsylvania decided, that the delivery of the goods is held to be as requisite in the case of a mortgage of goods, as in the case of an absolute sale under the statute 13 and 27 Elizabeth, and that merely stating on the face of the deed, that possession was to be retained, is not sufficient to take the case out of the statute, even in the case of a mortgage of goods.

The principal case was cited in favor of the position that possession must follow a transfer, or that otherwise it will be void and fraudulent as to creditors, in *Kitchell v. Bratton*, 1 Scam. 303; *Powers v. Green*, 14 Ill. 389; *Thompson v. Yerk*, 21 Id. 74; *Allen v. Carr*, 85 Id. 389; but it was held in *Letcher v. Norton*, 4 Scam. 579, citing the principal case, that a mortgage of personal

property, though possession was retained by the mortgagor, was not necessarily fraudulent.

The general rule laid down in the principal case, that in a conveyance of personal property, the possession thereof remaining with the vendor is a fraud incapable of explanation, was approved and followed in the following cases, in which the principal case was cited: *Rhines v. Phelps*, 3 Gilm. 464; *Dexter v. Parkins*, 22 Ill. 146; *Reese v. Mitchell*, 41 Id. 368; *Lemen v. Robinson*, 59 Id. 118; *Ticknor v. McClelland*, 84 Id. 474. The principal case was cited in *Francis v. Rankin*, 84 Id. 170, to the effect that it is competent to a debtor to secure a creditor, notwithstanding that it is done in a manner that will ultimately delay other creditors. The principal case was likewise cited in *Reed v. Eames*, 19 Id. 596; *Vaughan v. Thompson*, Id. 81.

RETENTION OF POSSESSION OF PERSONAL PROPERTY BY VENDOR.—In *Swift v. Thompson*, 21 Am. Dec. 718, it was held that such retention was evidence of fraud, as against creditors of the vendor or *bona fide* purchasers, whether the sale be absolute or conditional, and the evidence would be conclusive unless a sufficient excuse be shown. In Pennsylvania, a retention of possession by a mortgagor, seems to render the mortgage fraudulent and void as to creditors: *Clow v. Woods*, 9 Id. 346. In Missouri it was held, that after a sale of personal property, retention of possession by the vendor rendered the transaction fraudulent as to subsequent purchasers: *Rocheblave v. Potter*, 14 Id. 305. So in New York, in *Sturtevant v. Ballard*, 6 Id. 281, the same doctrine appears to have been maintained; but from the note thereto it will appear that the present rule established by statute, is that retention of possession is only *prima facie* evidence of fraud. The Vermont rule also appears to be that a retention of possession by the vendor is a fraud in law, and makes the sale void as against creditors: *Boardman v. Keeler*, 15 Id. 670; *Fletcher v. Howard*, 16 Id. 686; *Batchelder v. Carter*, 19 Id. 707. The general rule, however, is that this is only *prima facie* evidence of fraud, and therefore may be rebutted: *Bissell v. Hopkins*, 15 Id. 259; *Coburn v. Pickering*, 14 Id. 383, note; *Kid v. Mitchell*, 9 Id. 702; *Brooks v. Powers*, 8 Id. 99; *Barrow v. Paxton*, 4 Id. 354; *Hodges v. Blount*, 1 Id. 563.

Where the deed is one of mortgage the general rule seems to be the same, that is, the retention of possession will be *prima facie* evidence of fraud, indeed, but not evidence of a character that may not be rebutted: *Hundley v. Webb*, 20 Am. Dec. 189; *Holbrook v. Baker*, 17 Id. 236; *Patten v. Smith*, 10 Id. 166; *Haven v. Low*, 9 Id. 25; *Barrow v. Paxton*, 4 Id. 354. In Vermont, where the strict rule prevails that retention of possession of chattels by a vendor is a fraud in law, an exception prevails in favor of a purchaser at an execution sale, it being held that retention of possession by defendant in execution after a sale by the sheriff is not a fraud in law, and will not vitiate the purchaser's title: *Boardman v. Keeler*, 15 Id. 670 and note, wherein it appears that the exception is one of general acceptance. See also, *Batchelder v. Carter*, 19 Id. 707.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

HOLMES v. SCHOFIELD.

[4 BLACKFORD, 171.]

RIGHT OF POSSESSION UNDER A CONTRACT FOR THE SALE OF LAND remains in the vendor until full payment is made and the vendee has complied with everything required to entitle him to a conveyance; it is not sufficient that he has paid part of the purchase price and executed his notes for the residue.

THE facts are stated in the opinion of the court.

H. Brown, C. Fletcher, and O. Butler, for the appellant.

J. Morrison, for the appellees.

BLACKFORD, J. This was an action of assumpsit brought by Samuel W. Schofield and William T. Ball against William Holmes. The case stated by the declaration is as follows:

On the nineteenth of January, 1835, the parties entered into an agreement in writing, by which the defendant below agreed to sell to the plaintiffs certain real estate, for the sum of one thousand eight hundred dollars. The plaintiffs were to pay the defendant four hundred dollars of the purchase money by the tenth of April, 1835, and to give him for the balance four notes of three hundred and fifty dollars each, payable annually. After all the payments should be made, the defendant was to give the plaintiffs a warranty deed for the property.

The plaintiffs, on the tenth of April, 1835, offered to pay the defendant the four hundred dollars, and execute to him the notes as agreed on, if he would give them immediate possession

of the premises. The defendant refused to receive the money and notes on the terms proposed.

Those are the material facts set out in the declaration.

To this action, the defendant pleaded the general issue.

The evidence, on the trial, showed the case to be substantially as the declaration states it. Verdict in favor of the plaintiffs for five hundred dollars; motion for a new trial made by the defendant overruled; and judgment rendered on the verdict.

We are of opinion that neither the declaration nor the evidence, shows any cause of action. The tender of the four hundred dollars and the notes, in April, 1835, was qualified by a demand of the possession of the property. The defendant was not bound to accept the money and the notes on the condition upon which they were tendered. There is no agreement, express or implied, in the writing declared on, that the defendant should deliver possession of the premises before the consideration money was all paid. His agreement was, that if the plaintiffs should comply with their part of the contract, and pay the whole one thousand eight hundred dollars as agreed on, he would then make them a deed. The only legal inference from the contract is, that possession of the property was to be given when the deed should be made. If the plaintiffs were to have possession sooner, that should have been specially provided for in the contract. There is no breach of the defendant's contract shown, either in the declaration or by the evidence, and the judgment against him must be reversed.

By Court. The judgment is reversed, and the verdict set aside, with costs. Cause remanded, with leave to the appellees to amend their declaration, etc.

ELLIOTT v. COGGSHALL.

[4 BLACKFORD, 228.]

GENERAL PLEA OF FRAUD, COVIN, and misrepresentation, is good in an action of assumpsit for goods sold and delivered, even when assailed by special demurrer.

THE facts are stated in the opinion.

J. Bariden and J. S. Newman, for the appellant.

M. M. Ray, for the appellee.

DEWEY, J. Assumpsit for goods sold and delivered. Pleas,

general issue, and "fraud, covin, misrepresentation, and deceit." Demurrer to the latter, assigning for cause: 1. That it amounts to the general issue; 2. That it does not allege the particulars of the fraud. Demurrer sustained; jury trial on the general issue; and final judgment for the plaintiff. The defendant appeals.

The only question presented for our consideration is, whether the plea alleging fraud in the general terms above stated, is good in form as well as substance?

In the case of *Pence et al. v. Smock*, 2 Blackf. 315, this court decided that such a plea was valid in debt on specialty. In the subsequent case of *Huston v. Williams*, 3 Id. 170 [25 Am. Dec. 84], a similar plea was sustained so far as to let in proof of fraud in the execution of a writing obligatory; but an opinion was expressed that a plea of fraud, whether in general or special terms, implicating the consideration of a specialty, could not, independently of our statute, constitute a defense at law. As, however, that question was not in that case, and is not in this, the point directly before the court, and as good authorities conflict on the subject, we express no opinion in relation to it on this occasion.

That fraud in the consideration of a simple contract is a good legal defense, we believe has never been seriously doubted: that it is, the case last referred to has established; but it still remains to be settled, whether it may be alleged in the general terms of the plea in this record. In the case of *Huston v. Williams*, the plea was sustained on the ground, that under it the same evidence was admissible, that might have been given under *non est factum*. The analogy arising from that decision is in favor of the validity of the plea of fraud in general terms, in actions on simple contracts; for under the general issue in those actions, fraud, as well as almost every other matter, which may be the subject of a special plea, can be given in evidence. A plaintiff, therefore, who declares upon a simple contract, must come into court prepared to show, not only that he has a good cause of action *prima facie*, but also to rebut everything which implicates its validity *ab initio*, or which tends to prove its discharge, satisfaction, or release. He can not complain that a plea *per fraudem*, generally, takes him by surprise. In truth, it narrows the ground of controversy to a single subject, with the particulars of which, in a large majority of instances, he is as well acquainted as his adversary.

Chitty says: "A general plea that a deed was obtained by the

plaintiff by fraud and misrepresentation is good:" 1 Chit. Pl., 5th ed., 570. It can not be said, that in thus speaking of such a plea, he meant to apply the remark to those general pleas of fraud designed only to question the execution of the instrument. The reason which he assigns (in the words of Lord Ellenborough, in the case of *Hill v. Montagu*, 2 Mau. & Sel. 378) forbids such a construction of his language. Reference to that case will show, that he designed to lay down a rule of pleading in all cases of fraud. The action in that case was founded upon a specialty; the defendant pleaded usury in general terms; upon special demurrer the plea was held to be bad. Lord Ellenborough remarked: "Usury is not like fraud and covin, which usually consist of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth." In making this remark, the judge's attention was directed, not to the execution of an instrument, but to its consideration. Chitty also cites *Tresham's case*, 9 Co. 110. It is possible, that case does not quite support the unqualified proposition laid down by Chitty, but it shows conclusively that he had reference to pleas extending the alleged fraud beyond the mere execution of a deed; for the fraud—which was averred in the replication—had nothing to do with the execution of an instrument. It consisted in not causing certain recognizances, which had been paid and satisfied, to be canceled, and in setting them up as outstanding debts against the estate of an intestate. But whatever may have been the manner of pleading fraud in England, in the time of Coke, it is certain that Chitty is fortified in his position, not only by the opinion of Lord Ellenborough, but by later authorities in that country.

In the case of *Waldo v. Martin* in covenant, in addition to *non est factum*, and pleas setting forth illegality of the consideration, was a plea "that the indenture in the declaration mentioned, was obtained and procured from the defendant by fraud, covin, and deceit of plaintiff." Issue was taken upon this plea without objection, and a jury trial had: 4 Barn. & Cress. 319. *D'Aranda v. Houston et al.*, reported in 6 Car. & P. 511, was a case of debt on a bond. Pleas: *non est factum*, and "fraud, covin, and misrepresentation." Issues, and jury trial. As in both these cases *non est factum* was pleaded, it can not be inferred that the pleas of fraud were designed to try the same issue. Indeed, it is shown that in the latter case, evidence was given to the jury touching the consideration of the bond.

In Kentucky, the general plea of fraud has been held to be good, upon demurrer, in actions both upon simple contract and deed: 1 J. J. Marsh. 106;¹ 2 Dana, 161.

We lay no stress upon the authorities quoted, in their applicability to specialties, as their bearing in that respect is not the matter which we are considering. But as to the propriety of a general plea of fraud, impeaching the consideration of a simple contract, they seem to be conclusive. Indeed, without their aid, we have no difficulty in pronouncing such a plea good, inasmuch as fraud constitutes a legal defense under the general issue, and the effect of the plea is only to limit the ground of contention between the parties, as before observed.

By COURT. The judgment is reversed, with costs. Cause remanded, with leave to the plaintiff to withdraw his demurrer and reply, etc.

GENERAL PLEA OF FRAUD, in bar to an action upon a note, is sufficient, without setting forth the particulars of the fraud: *Ross v. Braydon*, 26 Am. Dec. 445; and it is good to an action of debt upon a writing under seal: *Huston v. Williams*, 25 Id. 84 and note. Upon the other hand, it was held in *Dean v. Mason*, 10 Id. 162, that in an action on a warranty on the sale of a chattel, where there is no substantive allegation of fraud, evidence of fraud is inadmissible; and see *Davis v. Hooper*, 24 Id. 751.

DOE, ON THE DEMISE OF WILKINS, v. RUE.

[4 BLACKFORD, 263.]

AMENDMENT OF AN EXECUTION to conform it to the judgment may be made after a sale thereunder, on motion of the purchaser.

A JOINT EXECUTION ON TWO SEPARATE JUDGMENTS is unauthorized and void. ERRONEOUS JUDGMENTS are valid until reversed.

VARIANCE BETWEEN SHERIFF'S DEED AND THE EXECUTION is not fatal; the deed is not required to particularly describe the execution.

A DEMURRER TO EVIDENCE admits the facts which that evidence, if admitted, would tend to prove, together with such inferences as may be reasonably drawn from such facts.

SALE OF QUARTER SECTION OF LAND FOR FIVE HUNDRED AND SIXTY-SEVEN DOLLARS, under an execution for eighty dollars, will not be treated as fraudulent or invalid, after the lapse of ten years.

THE facts appear from the opinion.

O. H. Smith and J. S. Newman, for the plaintiff.

J. Bariden, for the defendants.

BLACKFORD, J. This was an action of ejectment for a quarter

1. *Sharp v. White*.

section of land in Wayne county. Plea, not guilty; and judgment for the defendants.

The defendants moved to amend two executions against Wilkins, the lessor, under which, with another, the land in dispute had been sold by the coroner, and purchased by William Reniston, under whom the defendants claimed. This motion was granted, and the executions were accordingly amended. The making of these amendments is assigned for error.

The first execution which was amended, was in favor of Barker against Wilkins for twenty-five dollars and six cents. The judgment on which this execution issued, was for twenty-four dollars and thirty-four cents. The execution was amended so as to make the amount correspond with that of the judgment. We can see no objection to this amendment. The defendants were interested in the validity of the coroner's sale; because, if the sale was valid, the title to the premises was not in Wilkins, and he could not, therefore, recover in this action. The error in the amount of the execution was only a misprision of the clerk, and was amendable by the judgment: 2 Tidd Pr. 643; 2 Arch. Pr. 279; Graham Pr. 538; *Bissell v. Kip*, 5 Johns. 89; *Brown v. Bells*, 13 Wend. 29.

The other execution which was amended, was in favor of Asa Jeffries and John Smith against Wilkins for three hundred and fourteen dollars and ninety-nine cents, together with nine dollars and eighty-six cents as costs. This execution was amended, so as to require the coroner to make one hundred and twenty-seven dollars and three cents recovered by Jeffries, and one hundred and eighty-seven dollars and ninety-six cents recovered by Smith, and also to make the sum of nine dollars and eighty-six cents recovered by the plaintiffs for their costs. This amendment, it appears to us, has not made the execution any better than it was before, and the plaintiff, therefore, need not complain of it. The judgments in favor of Jeffries and Smith are not joint but several, and they are no authority for the execution under consideration. We shall notice this again, when we come to speak of the admission of this execution in evidence.

After these executions had been amended, a jury was impaneled to try the cause.

The defendants admitted on the trial, that the lessor of the plaintiff was the owner in fee simple, in 1824, of the premises in controversy; and that he was still the owner of the same, unless the defendants could show a paramount title.

The first evidence offered by the defendants to show their title, was two judgments against Wilkins, the lessor; one of them in favor of Jeffries, and the other in favor of Smith. The record of these judgments was objected to as evidence, but the objection was overruled. These judgments are in cases of attachment. The objections to their admission are, that the record does not show that bonds were filed; that, in one of the cases, no affidavit appears to have been made, and in the other, that the affidavit was made too long before the issuing of the writ; that, in one case, the only description of the cause of action is in the affidavit; and that there is not, in either case, any order for the sale of the property attached. Objections like these, not showing the judgments to be nullities, could not exclude the record as evidence. The force of such objections, whatever it may be, can only operate in cases of appeal and writs of error.

The next evidence offered by the defendants, was two judgments against Wilkins in favor of Barker. These judgments were admitted. It is said that their admission was objected to in the court below, but the objection is not urged here. The execution of *fieri facias* in favor of Asa Jeffries and John Smith against Wilkins, which we have already noticed, was offered in evidence by the defendants. This execution, which was issued upon the two judgments in attachment to which we have referred, was objected to as evidence, but it was admitted. The circuit court here committed an error. The two judgments, one in favor of Jeffries for one hundred and twenty-seven dollars and three cents, the other in favor of Smith for one hundred and eighty-seven dollars and ninety-six cents, are entirely distinct, and have no dependence on each other. The execution in question could not issue upon these several judgments. The variance is fatal.

The defendants further offered in evidence two executions against Wilkins in favor of Barker. This evidence was objected to in the circuit court, but it was admitted. The objection is now correctly abandoned. One of these executions, it is true, had issued for a small sum more than the judgment, but the variance had been obviated by an amendment.

The last evidence offered by the defendants, was the coroner's deed for the premises to the purchaser under the executions against Wilkins. This deed recites the execution in favor of Jeffries and Smith, and the executions in favor of Barker. The recital agrees with the executions as they were issued; but as

two of them had been subsequently amended, there was as to these a variance in the recital. This variance was insisted upon as an objection to the admission of the deed in evidence, but the circuit court overruled the objection. This objection is without foundation. One of the executions in Barker's favor, was issued in conformity with the judgment. That execution was not amended, and it is correctly recited in the deed. The execution in favor of Jeffries and Smith is, as we have before stated, not admissible evidence under the judgments in their favor; and the recital in the deed of that execution is, therefore, merely surplusage. The other execution in favor of Barker is for twenty-four dollars and thirty-four cents; but it is stated in the recital of the deed to be twenty-five dollars and six cents. Here is a slight variance; but the objection to the deed as evidence, on that ground, is not sustainable. A particular description of the execution is not required in the recital of a sheriff's deed; and such mistakes, therefore, in the recital, as the one we have just mentioned, do not affect the validity of the deed, or create any objection to its admission as evidence. It is not necessary to dwell upon this point, as it is settled by authority: *Jackson, dem. Martin et al., v. Pratt*, 10 Johns. 381; *Jackson, dem. Witherell et al., v. Jones*, 9 Cow. 182; *Sneed v. Reardon*, 1 A. K. Marsh. 217.

There is one question more in this cause to be considered. That question relates to the decision of the circuit court, in favor of the defendants, on a demurrer to their evidence; leaving out of our view the execution in favor of Jeffries and Smith. The plaintiff admits on the record, that the defendants have legal conveyances from the purchaser at the coroner's sale; so that the only question for the decision of the circuit court on the demurrer, was, whether the coroner's sale could, under the circumstances, be considered valid?

The amounts to be collected on the executions in favor of Barker, according to the indorsements on them, was about eighty dollars. The premises, viz., a quarter section of land, sold for five hundred and sixty-seven dollars. The sale was about ten years before the suit was commenced. This is the substance of the testimony relative to the sale. By the demurrer, the facts and conclusions which the evidence conduced to prove were admitted; and the court had a right to draw from the evidence every inference which a jury could reasonably have drawn from it: *Gibson v. Hunter*, 2 H. Bl. 187; *The Columbian Insurance Company v. Callett*, 12 Wheat. 383, 389.

The circuit court, in overruling the demurrer, have determined the sale to be valid; and we are not disposed to disturb that decision. There is nothing in the evidence, which could have prevented a jury from inferring from it, that the sale was in good faith. Indeed, it appears to us that the fact, unexplained as it is, that the plaintiff permitted ten years to elapse from the time of the sale and conveyance, before he thought proper to complain, conduced to prove that he was satisfied with the sale, and that it was not fraudulent.

By COURT. The judgment is affirmed, and judgment for costs against the lessor of the plaintiff.

AMENDMENTS OF CLERICAL ERRORS IN AN EXECUTION may be made upon the trial of an action against the sheriff for not levying it: *Hargrave v. Penrod*, 12 Am. Dec. 201; *Ross v. Luther*, 15 Id. 341. Other cases in this series on the amendments of executions, are *Toomey v. Purkey*, 12 Id. 634, and *Scribner v. Whitchee*, 23 Id. 708. Leave to amend judgment and execution should be granted, even after sale under the execution, if the justice of the case requires such amendment: *Hubbell v. Fogartie*, 26 Id. 163; *Giles v. Pratt*, Id. 170.

ERRONEOUS JUDGMENTS are valid until reversed, and can not be attacked collaterally: *Den v. Albertson*, 22 Am. Dec. 719; *Moore v. Tanner*, 17 Id. 35; and after the reversal the judgment will justify acts done by virtue of its authority before the reversal: *Dabney v. Manning*, 17 Id. 597; and a purchase of property sold under execution issued upon such judgment, will not be divested by the reversal of the judgment: *Little v. Bunce*, 28 Id. 363, note; *Wood v. Jackson*, 22 Id. 603; *Porter v. Robinson*, 13 Id. 153; *Woodcock v. Bennet*, Id. 568.

MISRECITAL OF EXECUTION IN SHERIFF'S DEED IS NOT FATAL: *Harrison v. Maxwell*, 10 Am. Dec. 611, and *Martin v. Wilbourne*, 27 Id. 393.

ON A DEMURRER TO EVIDENCE the court, in its discretion, may compel the party to join in demurrer, or to abandon his evidence: *Brandon v. Huntsville Bank*, 18 Am. Dec. 48.

HARRIS v. MUSKINGUM MANUFACTURING Co.

[4 BLACKFORD, 267.]

THAT PLAINTIFF IS A CORPORATION NEED NOT BE ALLEGED when it sues in its corporate name.

ONE MEMBER OF AN INCORPORATED COMPANY can not release a debt due it. PLEA THAT A CORPORATION HAS BEEN DISSOLVED BY THE ACTS of its members, is insufficient, without showing what those acts were.

JUDGMENT BY DEFAULT can not be entered while there are material issues made by the pleadings and not disposed of.

THE opinion states the facts.

G. W. Ewing, J. S. Newman, and D. H. Colerick, for the plaintiff.

H. Cooper and S. C. Sample, for the defendants.

BLACKFORD, J. The Muskingum manufacturing company brought an action of debt against Harris. The declaration is, substantially, as follows:

The Muskingum manufacturing company complain of Elisha Harris, otherwise Elisha B. Harris, in custody, etc., of a plea that he render to the plaintiffs the sum of one thousand two hundred and seventy-four dollars and eighty-seven cents, which he owes, etc. For that whereas the plaintiffs, on, etc., at, etc., recovered against said Elisha B. Harris one thousand two hundred and seventy-four dollars and eighty-seven cents above demanded, adjudged as their damages, and the sum of eleven dollars and forty-nine cents for their costs. Whereby an action has accrued to the plaintiffs to demand of the defendant the said sum of one thousand two hundred and seventy-four dollars and eighty-seven cents, as also the sum of eleven dollars and forty-nine cents costs, above demanded. And it is averred, that the defendant in that cause is the defendant in the present suit. Damages one thousand five hundred dollars.

The defendant pleaded five pleas: 1. Payment. 2. Accord and satisfaction. 3. That Nathaniel Wilson, one of the Muskingum manufacturing company, in consideration of a farm, etc., released the defendant from the debt; which release is lost. 4. That since the judgment, the corporation was dissolved by the consent and acts of its members. 5. *Nul tiel record*. To the first and second pleas there are replications in denial. The third and fourth pleas were demurred to, and the demurrers were sustained. To the fifth plea, the plaintiffs replied that there was such a record as stated in the declaration. The issue on the plea of *nul tiel record* was tried by the court and decided in favor of the plaintiffs. On the other issues, the defendant made default.

The final judgment in favor of the plaintiffs is for one thousand two hundred and eighty-six dollars and thirty-six cents in debt, and one thousand and eighty-six dollars and ninety-five cents in damages for the detention of the debt, amounting in all to the sum of two thousand three hundred and seventy-three dollars and thirty-one cents, together with costs.

The first objection to these proceedings is, that the declaration is insufficient. It is said that the declaration ought to

have averred that the plaintiffs were a corporation, and to have shown how they were incorporated. There is no ground for this objection. The name itself implies that the plaintiffs are a corporation: *Norris v. Steps*, Hob. 211. If the plaintiffs were not authorized to sue by the name which they have assumed, the defendant could have denied their existence by a special plea: *The Guaga Iron Company v. Dawson*,¹ decided at this term. The declaration before us, so far as regards the objection in question, is in the usual form: *Dean and Chapler of Rochester v. Pierce*, 1 Camp. 466; *United States Bank v. Haskins*, 1 Johns. Cas. 132.

The judgment sustaining the demurrer to the third plea is objected to, but without cause. The circumstance that the person named in the plea was one of the company, gave him no authority to release a debt due to the corporation.

It is contended, that the demurrer to the fourth plea should have been overruled, but we are not of that opinion. The plea, that since the judgment declared on the corporation had been dissolved, is an affirmative plea, and the causes and manner of the dissolution ought to have been shown. To say merely, as this plea does, that the corporation had been dissolved by the consent and acts of its members, is not sufficient. A corporation can not be dissolved by the consent of its members, except it be by the surrender of their franchise to the government, and an acceptance by the government of the surrender. But this plea shows no such surrender and acceptance, and is consequently bad: 2 Kent Com. 310.

On the trial of the issue on the plea of *nul tiel record*, the plaintiffs offered in evidence a transcript of the judgment on which the suit was founded. The evidence was objected to on the ground of variance, but the objection was overruled. The present suit is brought against Elisha Harris, otherwise Elisha B. Harris, and the judgment given in evidence is against Elisha Harris. It is said that there is a variance here as to these names, but we do not think the objection is tenable. It is also said, that the judgment given in evidence does not agree, as to the amount of the debt, with the judgment declared on. In this, the defendant is mistaken. The body of the declaration shows the amount recovered in Ohio to be one thousand two hundred and seventy-four dollars and eighty-seven cents damages, and eleven dollars and forty-nine cents costs. The transcript admitted in evidence agrees with that statement. The circum-

stance that the sum demanded in the *queritur* of the declaration is for a less amount, is not material: *Lord v. Housloun*, 11 East, 62.

There is, however, an error in these proceedings for which the judgment must be reversed. There are two pleas to the action, viz., payment and accord and satisfaction—upon which issues were joined by the plaintiffs. These issues have not been tried. A judgment could not be taken by default over these pleas. When the defendant was called and failed to appear, the only course for the plaintiffs to take was, to have a jury impaneled to try the issues on these pleas, in the same manner as if the defendant had appeared and defended the cause: 2 Arch. Pr. 28; *Graham* Pr. 631.

By Court. The judgment is reversed, and the proceedings subsequent to the entry of the defendant's default set aside, with costs. Cause remanded, etc.

ALLEGATION OF CORPORATE EXISTENCE.—The weight of authority sustains the position, that a suit brought by a corporation, in its corporate name, is an implied assertion of corporate existence, and one sufficient, even though the declaration, containing no allegation of greater certainty as to this point, is therefore demurred to. In *Bennington Iron Company v. Rutherford*, 18 N. J. L. 107, there was an attempt to take advantage of such an alleged defect upon demurrer, but the court overruling the demurrer said: "A party must come into court in his true and proper name. If he fails to do so, the defendant may interpose his plea in abatement; but if he pleads to the action, he admits the plaintiff's right to sue in the name assumed. In the present case, the name of the plaintiff is distinctly stated, till the contrary appear, and the law will presume it to be truly stated till the contrary appear, and can not, without a tax upon common sense, infer it to be the name of an individual or natural person; nor will it presume it to be the name of an unincorporated company or partnership, who can sue only in their individual names; but of an incorporated company who have a right to sue in their incorporated name. A rational construction is to be given to pleading, where it is susceptible of it; and we are not to resort to any other when it is equally natural and more consistent with the intent and object which the party has in view." Similar views were asserted and approved in the following cases: *Rees v. Conococheague Bank*, 5 Rand. 326; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. 146; *Zion Church v. St. Peter's Church*, 5 Watts & S. 215; *Union Mutual Ins. Co. v. Osgood*, 1 Duer, 707; *Kennedy v. Cotton*, 28 Barb. 59; *Lafayette Ins. Co. v. Rogers*, 30 Id. 491; *Phoenix Bank v. Donnell*, 41 Id. 571; *Frye v. Bank of Illinois*, 10 Ill. 332; *Heaston v. Cincinnati etc. R. R. Co.*, 16 Ind. 275; *German Ref. Church v. Von Puechelstein*, 27 N. J. Eq. 30; *Gillett v. American Stove & Hollow Ware Co.*, 29 Gratt. 565; *Odd Fellows' Building Assoc. v. Hogan*, 28 Ark. 261; *Wilson v. Sprague M. M. Co.*, 55 Ga. 672; *Adams Express Co. v. Hill*, 43 Ind. 157.

Similarly, in an action against a corporation, if it is sued by its corporate name, this will be sufficient, and the declaration will not be demurrable for want of allegations of greater certainty as to corporate existence: *Lighte v.*

Everett etc. Ins. Co., 5 Bosw. 716; *Dodge v. Minnesota Plaster Slate Roofing Co.*, 14 Minn. 49; *Woolf v. City Steamboat Company*, 62 Eng. C. L. 103.

The rule as above laid down, though of general, is not of universal acceptance; it is denied in *Byington v. Mississippi & Missouri R. R. Co.*, 11 Iowa, 502; and in *Central Manufacturing Co. v. Hartshorne*, 3 Conn. 202. Hosmer, C. J., expressed the opinion, concurred in by the court, that the plaintiff claiming as a corporation, under a private act of the general assembly, was bound to set forth in its bill at least that portion of the act conferring upon it the power to sue. But in the Iowa case it was intimated that in an action *ex contractu*, if a contract was set out which professed to have been made with the plaintiff in its character of corporation, this would be a sufficient allegation of corporate existence.

In other of the states, the question whether a corporation might declare in its corporate name, without averring that it is a corporation, has not arisen, but such general forms of declaration as that plaintiff is a corporation under the laws of the states has been approved of: *California Steam Navigation Co. v. Wright*, 6 Cal. 258; *Selma R. R. Co. v. Tipton*, 5 Ala. 787.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

HAUSE v. JUDSON.

[4 DANA, 7.]

VENDOR'S RIGHT OF STOPPAGE IN TRANSITU IS NOT SUPERSEDED BY AN ATTACHMENT of the goods by a creditor of the vendee, while in transit in the hands of a common carrier or forwarder.

VENDOR HAS THE SAME RIGHT TO THE PROCEEDS as he had to the goods, where his right is asserted after they are converted into money, under an order of the court issuing the attachment, but before an appropriation of the proceeds or an adjudication of the rights of the parties.

COURT OF CHANCERY MAY ENFORCE THE RIGHT OF STOPPAGE *in transitu*, especially when the goods are already under the control of that court by an attachment in chancery.

CHARGES AND EXPENSES OF THE FORWARDER in whose hands the goods were attached and by whom they were sold, under the chancellor's order, must be first paid out of the proceeds in such a case.

APPEAL from the Jefferson county circuit court. The case is stated in the opinion.

Pirtle, for the plaintiffs.

No appearance for the defendants.

By Court, MARSHALL, J. In June, 1832, William Hause & Son, merchants of Philadelphia, packed and forwarded, under an order from S. P. Judson, of St. Louis, Missouri, twenty-six packages of goods, in as many trunks and boxes, which they sent, by the way of Baltimore, each marked as follows: "S. P. Judson, St. Louis, Mo.—care of E. L. Eichelberger, Balt.—from Wm. Hause & Son, Phila." The packages thus addressed and forwarded, passed to and down the Ohio river, on their

way toward St. Louis, until they arrived at Louisville; where, together with other goods also on their way to the same consignee, they were stopped in the hands of William G. Bakewell, by an attachment in chancery, issued in July, 1832, at the suit of Anderson & Atterbury, who prayed that they might be subjected to the satisfaction of their debt, claimed in the bill, on the ground that they were the property of Judson, an absent debtor. Three other creditors followed immediately with attachment bills, containing similar prayers, each succeeding bill referring to those which had been previously filed, and yielding precedence to the claims therein set up. On these bills a general order was made by the chancellor, directing Bakewell to sell the goods of Judson in his hands, make report of the sales, and hold the proceeds (after deducting charges and his own claim against Judson) subject to the further order of the court.

In this state of things, Hause & Son, in November, 1832, filed their bill against Judson, Bakewell, Anderson & Atterbury, and the other attaching creditors. They state, substantially, the foregoing facts, describe the kind and value of the goods contained in the twenty-six packages, and allege that no part of the price had been paid; that Judson was a resident of St. Louis, but had gone off to Texas; that he was insolvent, and that the goods had never come to his hands, directly or indirectly. In consequence of these facts, and by virtue of their alleged right of stoppage *in transitu*, they claim the goods in the twenty-six packages as their own; and they allege, that they had so claimed them from Bakewell, but that he had sold a part, and was proceeding to sell the rest of them under the order of the chancellor, without regard to their claim. They pray, in effect, that the proceeds of the twenty-six packages—to the continued sale of which they consent—be held for their benefit; or otherwise, that the amount already made be paid to them, and the packages unsold delivered to them, on their entering into bond, etc.; and they ask for an injunction and for general relief.

An injunction was granted, restraining Bakewell from paying over to the other claimants any of the proceeds of the twenty-six packages described in the bill. Anderson & Atterbury answered; and the three attachment bills last filed having been dismissed by the complainants therein, thus leaving Hause & Son and Anderson & Atterbury the only contesting claimants; the two suits brought by these parties were consolidated and heard together, and the same decree was entered in each case.

The answer of Anderson & Atterbury is little more than a denial of any knowledge of the fact, that the complainants were the vendors of the goods, and an implied averment that the twenty-six packages came to the hands of E. L. Eichelberger at Baltimore, and of themselves at Wheeling, as the agents of Judson, and not of the complainants. Neither Bakewell nor Judson filed any answer to this bill; and the only evidence in the cause, is a deposition proving the packing and forwarding of the goods, and their kind and value, as stated in the bill; from which it appears that the demand of Hause & Son against Judson, on account of these goods, is twelve hundred and ninety-eight dollars.

The claim set up by Anderson & Atterbury in their bill, is an account for goods sold and for charges paid for forwarding goods, amounting to three thousand two hundred and twenty-five dollars and ninety-eight cents, "unless Judson had paid their two drafts, amounting to nine hundred and twenty-five dollars and forty-eight cents, which they say they fear and believe he has not paid, although they are credited in the account filed, under the supposition that they would be paid." With these credits the balance due on the account is two thousand two hundred and seventy dollars and fifty cents. The drafts were due and payable some weeks before the bill was filed, and there is no further allegation or proof in relation to them. Nor did any of the defendants answer.

It does not appear that Bakewell ever made any report of sales, as directed by the order of the chancellor; but a short time before the hearing, an amended bill was filed on the part of Anderson & Atterbury, stating that he had made sales and had in his hands, after paying costs and charges, more than three thousand dollars. And on the final hearing of both suits, the circuit court decreed, that Bakewell, retaining his costs, should pay to Anderson & Atterbury, as due them from Judson, the whole amount of three thousand two hundred and twenty-five dollars and ninety-eight cents, and that out of the remaining proceeds of the sales, he should pay, as far as the fund would go, the claim of Hause & Son and their costs. For the reversal of this decree, Hause & Son prosecuted a writ of error.

If the decree were correct in giving precedence to the claim of Anderson & Atterbury, we should think it erroneous as regards the extent to which they are preferred. The statements of their bill do not amount to an allegation that the drafts

- which are credited in their account had not been paid; nor to a direct averment that the sum decreed was in fact due. Their apprehension that the drafts had not been paid is not equivalent to a direct averment of the fact itself; and if their apprehensions had afterward proved true, they should have stated the fact in an amended bill. As there is no such statement, the decree upon taking the bill for confessed, should have been for the smaller sum which remained after deducting the amount of the drafts, as is done in their account filed with the bills as a statement of their claim; and to that extent only, could they be entitled to the preference as against Hause & Son.

But we are of opinion, that the decree is subject to the more radical objection of having improperly given precedency to the claim of Anderson & Atterbury, when, so far as relates to the goods of which Hause & Son were the vendors, their claim under the right of stoppage *in transitu*, was paramount.

The right of stopping goods *in transitu* is defined by Chancellor Kent, 2 Com. 540, to be "the right which the vendor, when he sells goods on credit to another, has, of resuming the possession of the goods, while they are in the hands of a carrier or middleman, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which has been appointed for them, upon his (the vendee's) becoming bankrupt or insolvent." It is said to be an equitable power, which, although the property is vested in the consignee by delivery to a carrier, to be transported to him, yet remains in the consignor, of resuming it, under certain circumstances, before it actually gets into the possession of the vendee: Law of Carriers, 101. The right, though first acknowledged in equity, is so well established at law as to be the admitted foundation of an action of trover. But it is said not to be founded upon the idea of a rescission of the contract, but to assume its continuance as in case of an equitable lien, so that it is extinguished by payment of the price, and the vendee may recover back the goods: 2 Kent Com. 541. And being a right coeval with and springing out of the very contract by which the vendee claims the goods, it is paramount to any lien of a third party against him, unless such lien arise from the necessary care, trouble, or expense incurred about the goods themselves in the course of the transit: Id. 550; Law of Carriers, 103; *Oppenheim v. Russell*, 3 Bos. & Pul. 49.

A necessary consequence of these principles, and of the estab-

lished properties of the right in question, is, that it can not be superseded by an attachment at the suit of a general creditor of the vendee, levied while the goods are *in transitu*: Law of Carriers, 111; *Northey v. Field*, 2 Esp. 613; *Smith v. Goss*, 1 Camp. 282. In the last of which cases, Lord Ellenborough said—"The right of the consignor to stop *in transitu* can not be defeated by the process of a creditor, who can have no greater right than the consignee himself. The vendor's right of intercepting the goods is the elder and preferable lien, and can not be superseded by the attachment." If then the right asserted by the complainants existed when the goods were attached by Anderson & Atterbury, it was neither defeated nor postponed by the attachment.

Upon comparing the facts of the case with the definition which has been stated, the only point upon which the existence of the right can be questioned, is, whether the transit of the goods had determined when they were attached in the hands of Bakewell, and on this point we think there is little room for doubt. The ground which seems to be relied on by the defendants, in contesting this point, is that the persons who had the custody of the goods at Baltimore, Wheeling, and Louisville, and by whom they were forwarded on to Louisville, were the agents of Judson; that the goods must, therefore, be considered as having come to his possession, and as being no longer in the course of transit from the vendors to him. It is, however, entirely clear from the whole case, that the persons who had possession of the goods at these several places, and those by whom they were transported from the one to the other, were in no other manner the agents of the vendee than as common carriers, receivers, and forwarders of goods. They were, in fact, but a succession of carriers or middlemen engaged in that capacity, in forwarding the transit of the goods from one intermediate stage to another on their way from the vendors to the vendee. And there neither appears to have been any special agency for the vendee, nor were the goods ever under his actual control or direction, or in any manner influenced in their progress by any impulse proceeding from him. On the contrary, they went forward in the ordinary way, under the original impulse and direction given to them by the vendors at Philadelphia, until they were stopped by attachment at an intermediate stage of their transit. They had not then reached their place of destination, nor come into the actual possession or control of the vendee.

It is true, that by the first delivery to the carrier at Philadelphia, the goods were constructively delivered to the vendee, and the property thereby became vested in him; but this constructive delivery for the purpose of transporting the goods to him at the distance of a thousand miles, was in fact but the beginning of the transit, and did not vest the actual possession in him. It is also true that, in some cases, the transit is determined, and indeed effected by a constructive delivery; but there are cases in which the constructive delivery places the goods within the immediate control of the vendee. The distinction laid down by Chancellor Kent, 2 Com. 545, as one by which the cases arising on a constructive delivery may be reconciled is, "that if the delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such constructive delivery to the vendee; but if the goods be delivered to the carrier or agent, for safe custody, or for disposal on the part of the vendee, and the middleman is by agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage." The latter branch of the distinction may be elucidated by the rule or principle previously stated by the author—"that if the goods have once fairly arrived at their destination, so as to give to the vendee the actual exercise of dominion or ownership over them, the right (of stoppage) is gone." Whether the interception of the goods by the vendee before they had reached their place of destination, and the assumption of actual dominion over them by changing their destination, or otherwise, might not determine the transit, need not be decided. There was no act of that sort in this case. These authorities, as well as the reason of the thing, leave no question in our mind that the goods were as certainly on their transit, and as clearly subject to be stopped by the vendors, when they came to the hands of Bakewell at Louisville, to be by him forwarded to St. Louis, and when they were attached in his hands, as they were at any previous point of their progress, from the moment when they were delivered out of the hands of the vendors at Philadelphia.

The attachment did not, as we have seen, defeat the vendor's right, to which the goods, being then *in transitu*, were subject. Nor could the subsequent proceedings under the attachment destroy the right, if asserted before the goods were actually sold and dispersed under the order of the chancellor, and the proceeds appropriated by his decree. A contrary determina-

tion would enable any creditor to gain priority by attaching the goods at any stage of their transit; which would be inconsistent, not only with the conclusion previously stated as to the effect of an attachment upon the right of stoppage *in transitu*, but with the principle on which the right is founded, viz.: "that it is held to be unreasonable to allow the goods of a vendor to be appropriated to the payment of other creditors of the vendee who fails before payment and before the goods have actually reached him."

It seems that some of the goods had been sold, under the order of the chancellor, before the complainants filed their bill, and perhaps before they made any demand. The sale was made for the benefit of all concerned; and before any appropriation of the proceeds, or any adjudication upon the rights of any of the parties, the complainants asserted their right to the subject. Under these circumstances the conversion of the goods into money should not be considered as affecting in any degree the relative rights of the claimants; but the proceeds should be held subject to the same rights, and in the same order, as the goods themselves would have been had they been retained *in specie*. It was not the intention, and could not properly be the effect of the sale, any more than of the attachment itself, to displace pre-existing rights.

The power of the chancellor to enforce the right of stoppage *in transitu*, has been admitted by this court, in the case of *Ford and Warren v. Sproule & Co.*, 2 Marsh. 528 [12 Am. Dec. 439], and is, we think, unquestionable. The right is of equitable origin, and its subsequent recognition and enforcement by courts of law do not, according to the uniform decisions of this court in similar questions, divest the court of chancery of its jurisdiction. But whatever might be thought of the general question of jurisdiction, the goods in relation to which the right is now asserted, being in the custody and under the control of the chancellor, and a part of them having been sold by his order, before the right was asserted, there seems to have been a peculiar propriety in resorting to the same tribunal for the assertion and enforcement of the right. In doing so, however, the complainants subject themselves to the equitable condition, that the price of the goods with the reasonable expense of prosecuting their claim, is all that they are entitled to, especially when they come in conflict with other creditors. To this extent, we have no doubt they are entitled to the proceeds of that portion of the attached goods which was contained in the packages

described in their bill, in preference to any other creditor of Judson, and in preference to all other claims upon the goods, except the claim of Bakewell for charges and trouble relating to these particular goods.

The decree is reversed, and the cause remanded, with directions to enter a decree in conformity with this opinion, so far as to give precedence to the claim of Hause & Son over that of Anderson & Atterbury in the appropriation of the proceeds of the twenty-six packages described in the bill. But as neither Judson nor Bakewell prosecutes a writ of error to the decree of Anderson & Atterbury against them, the only effect of this opinion is to change the order in which the sum in the hands of Bakewell arising from the sale of the attached goods, is to be appropriated.

STOPPAGE IN TRANSITU, RIGHT OF.—There is manifest equity in allowing to an unpaid vendor of goods a preference over other creditors of the vendee in resorting to those goods for payment, especially where all can not be paid in full, and that the right to such preference should continue, under proper restrictions, at least until the goods have passed into the absolute possession and control of the vendee, and have become, as it were, merged into the general mass of his property so as to be indistinguishable from the residue of his effects. It is upon this just principle that the vendor's lien and right of stopping goods *in transitu* are based. The vendor's lien is gone as soon as the goods have left his actual possession; but the right of stoppage *in transitu* continues until they have reached the buyer's hands, or, at least, have come within his absolute control.

ORIGIN OF RIGHT.—In his learned and valuable opinion in *Gibson v. Carruthers*, 8 Mee. & W. 321, Lord Abinger lays it down, that the right of stopping goods *in transitu* is of uncertain parentage, some holding it to be a creature of equity, while others insist that it is of common law origin. The better doctrine is, however, that it was imported into the English law merchant and thence into the common law from the equity courts: Story on Sales, sec. 318; *Allen v. Mercier*, 1 Ash. 103; *Morris v. Shryock*, 50 Miss. 590. "Though first of all sanctioned by a court of equity," says Mr. Chief Justice Gibson, "it has grown, by commercial usage, into a legal privilege:" *Bell v. Moss*, 5 Whart. 189. The first reported case in which the doctrine was applied in the English courts, according to the opinion of Lord Abinger, is *Gibson v. Carruthers*, above referred to, was *Wieman v. Vandepuut*, 2 Vern. 203. That was a case of a bill in equity filed by the assignees of certain bankrupt vendees of goods against the unpaid vendors, who had got the goods again into their possession while *in transitu*. The chancellor directed them to bring trover, which was done, and a verdict returned for the plaintiffs. At the subsequent hearing, his lordship said that the vendees not having paid for the goods, and having become bankrupt, if the vendors "could by any means get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity." The next case, as Lord Abinger says, was *Snes v. Prescott*, 1 Atk. 245. A bill in equity still lies to enforce this right in a proper case: *Schotmans v. Lancashire etc. Co.*, L. R., 2 Ch. App. 332. The

doctrine rests, as Lord Keeper Henley tells us in *D'Aquila v. Lambert*, 1 Amb. 399, on the "solid reason that the goods of one man should not be applied in payment of another man's debts." For this reason it is a right highly favored by the law: Benj. on Sales, sec. 830; 2 Kent Com. 540; *Houst. on Stop. in Trans.* 1-3; *Cabeen v. Campbell*, 30 Pa. St. 254; *Calahan v. Babcock*, 21 Ohio St. 281; *Inslee v. Lane*, 57 N. H. 454.

EXTENSION OF VENDOR'S LIEN.—It has been a subject of dispute as to whether the right of an unpaid vendor to stop goods *in transitu* is a right to rescind the contract, or a right to resume the lien lost by parting with the actual possession of the goods. The latter is unquestionably the better view, and may now be regarded without doubt as the settled doctrine: Benj. on Sales, sec. 867; Story on Sales, sec. 320; *Rowley v. Bigelow*, 23 Am. Dec. 607; *Newhall v. Vargas*, *post*; *Stanton v. Eager*, 16 Pick. 467; *Atkins v. Colby*, 20 N. H. 154; *Blum v. Marks*, 21 La. Ann. 268; *Benedict v. Schaettle*, 12 Ohio St. 515. The doctrine is analogous to, if it is not derived from, the revendication of the civil law: *In re Westzynthius*, 2 Nev. & M. 650, note; *Benedict v. Schaettle*, 12 Ohio St. 515. It is a right to resume, not the property in the goods, but the possession which is necessary to support the vendor's lien. The property is recognized as being irrevocably in the purchaser when the right is exercised; for, as Willes, J., says, in *Bolton v. Lancashire etc. Co.*, L. R., 1 Com. Pl. 439, "unless the property passed, there would be no need of the right of stopping *in transitu*:" *Fraser v. Wilt*, Id., 7 Eq. 64; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580; *Dickman v. Williams*, 50 Miss. 500. It is a consequence of the principle that the vendor has merely the right of restoring his lien by resuming possession, and does not reveal the property in himself, that where the vendee has paid part of the price repayment need not be offered before exercising the right: *Newhall v. Vargas*, *post*.

ONLY A VENDOR OR QUASI VENDOR CAN EXERCISE.—The right of stoppage *in transitu* belongs only to one occupying the relation of vendor or quasi vendor towards the consignee of the goods: Benj. on Sales, sec. 830. A factor or correspondent purchasing goods upon the order of his principal, but paying for them with his own money, or buying on his own credit and shipping them to the principal at the original price, with his charges and commissions added, may stop the goods *in transitu*, where the principal becomes insolvent: *Newhall v. Vargas*, *post*; *Seymour v. Newton*, 105 Mass. 272; *Feise v. Wray*, 3 East, 93; *D'Aquila v. Lambert*, 1 Amb. 399; S. C., 2 Eden, 75; *Tucker v. Humphrey*, 4 Bing. 516. So a principal may stop goods consigned to his factor, who has accepted bills for their price, and after paying part of the freight has become insolvent, and the latter not having obtained possession, has no lien upon them: *Kinloch v. Craig*, 3 T. R. 119; S. C., 4 Bro. P. C. 47. And where a vendee of goods and his factor both become insolvent, the vendor may stop them before coming to the factor's hands, although the latter has a bill of lading indorsed to order, and is under acceptance to the vendee on a general account: *Patten v. Thompson*, 5 Mau. & Sel. 350. A mere surety for the price who has not paid it, can not exercise the right: *Siffken v. Wray*, 6 East, 371. But one who has paid the price for the purchaser and taken an assignment of the bill of lading as security for his advances may stop the goods *in transitu* on the insolvency of such purchaser: *Gossler v. Schepeler*, 5 Daly, 476. The insolvency of one who was not the purchaser of the goods, but upon whose promise to pay they were furnished, gives no right to stop the goods: *Eaton v. Cook*, 32 Vt. 58. The vendor did not sell to him. One who is not a vendor of goods,

but has a lien upon them for labor performed upon them, or the like, upon parting with the goods can not resume his lien by stopping them *in transitu*; as in the case of a fuller who has delivered cloth to a carrier to be conveyed to his principal, on the latter's account and risk: *Sweet v. Pym*, 1 East, 4. A vendor of an interest in a contract to deliver goods to him may stop them on the insolvency of his vendee; as where one having a share in a cargo of beans, the whole of which was included in a bill of lading to another party, and having an order on the master of the vessel in which they were shipped for the delivery to himself or bearer of a specified number of sacks of the said beans, sold them on credit to another person before their arrival, giving up the delivery order to him; and such purchaser became insolvent: *Jenkyns v. Usborne*, 7 Man. & G. 678; S. C., 8 Scott, 505.

INSOLVENCY ONLY GROUND FOR.—It is said, *Wood v. Roach*, 1 Am. Dec. 276, that a vendor may stop goods *in transitu* in two cases: 1. Where he has received no consideration for them; 2. Where the consignee has become insolvent. So it has been held that the discovery of the falsehood of material representations on the part of the buyer will give this right: *Fitzsimmons v. Joslin*, 21 Vt. 129. The prevailing opinion is, however, that the right exists only in case of the insolvency of the purchaser, and this is no doubt the correct view of the matter: Benj. on Sales, secs. 828, 837; *The Constantia*, 6 Rob. Adm. 321; *Fraser v. Witt*, L. R., 7 Eq. 64. The vendor can not be allowed this extraordinary privilege simply "because he has changed his mind:" *Per* Lord Romilly, in the case last cited. It is wholly inconsistent with the principles upon which the right is based, to permit its exercise in a case of fraud or misrepresentation in the sale. That would be a ground for rescinding the sale, not for restoring the vendor to his lien.

INSOLVENCY MEANS WHAT, IN SUCH CASES.—Insolvency, in this class of cases, imports a general inability to pay one's just debts in the usual course of business: *Durgy etc. Co. v. O'Brien*, 123 Mass. 12; S. C., 5 Cent. L. J. 147. It is usually evidenced by stopping payment: *Chandler v. Fulton*, 10 Tex. 2; *O'Brien v. Norris*, 16 Md. 122; *Inslee v. Lane*, 57 N. H. 454. Indeed, it is held in *Rogers v. Thomas*, 20 Conn. 53, that it must be evidenced by that or some other overt act, such as taking the benefit of the insolvent laws. But the contrary is laid down in *Benedict v. Schaettle*, 12 Ohio St. 515. Certainly a technically declared insolvency is not necessary; if the insolvency exists as a fact, it is enough: *The Tigress*, 32 L. J., Prob., and M. & Adm. 97; *O'Brien v. Norris*, 16 Md. 122. Such insolvency may be proved in any satisfactory way: *Hays v. Mouille*, 14 Pa. St. 48. Proof of a failure to pay one just and admitted debt would probably be sufficient: Benj. on Sales, sec. 837; Smith's Mercantile Law, 549, note. The insolvency may be proved by circumstances: *Reynolds v. Boston etc. R. R.*, 43 N. H. 580. Any well-founded information of an embarrassment or failure on the vendee's part to meet the demands of creditors was held in *More v. Lott*, 13 Nev. 376, to be sufficient proof of insolvency. This seems to be, to say the least of it, a very liberal rule towards the vendor. The vendee's own admission of his insolvency is sufficient until disproved: *Secomb v. Nutt*, 14 B. Mon. 261. In that case Marshall, J., says: "It is sufficient to show, with reasonable certainty, that is, with probability, that the vendee is embarrassed and not able to make full or general payment of his debts." This appears to us a satisfactory statement of the rule which should govern if we omit the explanation given to the terms "reasonable certainty." Does not "reasonable certainty" mean something more than "probability"?

WHETHER INSOLVENCY MUST ARISE AFTER SALE.—In one very carefully

reasoned case it is laid down that in order to give an unpaid vendor the right to stop goods *in transitu* because of the insolvency of the purchaser, such insolvency must arise after the sale: *Rogers v. Thomas*, 20 Conn. 53. But this is clearly contrary to the weight of authority as well as to sound reason. It is too well settled to admit of a reasonable doubt, that though the insolvency existed at the time of the sale, if it was not discovered until afterwards by the vendor, he has the right to stop the goods *in transitu*: *O'Brien v. Norris*, 16 Md. 122; *Blum v. Marks*, 21 La. Ann. 268; *Buckley v. Furniss*, 15 Wend. 137; *Benedict v. Schaeffle*, 12 Ohio St. 515; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580; *Rucker v. Donovan*, 13 Kan. 251; S. C., 19 Am. Rep. 84. If the vendor exercises his right of stoppage prematurely, that is, before the insolvency occurs, but while it is impending, he does so at his peril: *The Constantia*, 6 Rob. Adm. 321.

HOW AFFECTED BY TAKING NOTE, SECURITY, PART PAYMENT, ETC.—The fact that a credit is given to the purchaser for the price of the goods, under a general agreement, does not debar the exercise of this right, where the purchaser becomes insolvent: *Stubbs v. Lund*, 5 Am. Dec. 63. So taking the purchaser's note or acceptance for the price does not defeat the right: *Edwards v. Brewer*, 2 Mee. & W. 375; *Jenkyns v. Usborne*, 7 Man. & G. 678; S. C., 8 Scott, 505; *Arnold v. Delano*, 4 Cush. 33; *Newhall v. Vargas*, *post*. So, though the acceptance is probable under the bankruptcy: *Feise v. Wray*, 3 East, 93. And where a note is taken it need not be tendered back, on exercising the right: *Hays v. Mouille*, 14 Pa. St. 48. Nor does the fact that the vendor has negotiated the note or acceptance destroy his right: *Miles v. Gorton*, 2 Crompt. & M. 504; *Newhall v. Vargas*, *post*. Payment made by an order or note of a third person, unindorsed, takes away the privilege of stoppage *in transitu*: *Eaton v. Cook*, 32 Vt. 58. Part payment is ineffectual to defeat the right: *Howatt v. Davis*, 7 Am. Dec. 681; *Hodgson v. Loy*, 7 T. R. 440; and the vendor is not bound to refund such part payment: *Newhall v. Vargas*, *post*. Nor does the fact that the vendor has recourse to some other party militate against his exercise of this right on the purchaser's becoming insolvent: *Bell v. Moss*, 5 Whart. 189. Goods consigned by a debtor to his creditor on account of the indebtedness can not be stopped: *Vertus v. Jewell*, 4 Camp. 31; *Clark v. Mauran*, 3 Paige, 373. Otherwise where the account is unadjusted, and the goods are not shipped on that account, but a bill is drawn for the price: *Wood v. Jones*, 7 Dow. & Ry. 126.

COMMENCEMENT OF AN ACTION FOR THE PRICE of the goods by the vendor's attorney without his knowledge, neither of them being apprised that the *transitus* is not terminated, is no waiver of the right of stoppage *in transitu* if asserted in a reasonable time, and if the improvident action is not prosecuted: *Calahan v. Babcock*, 21 Ohio St. 281.

BEGINNING OF TRANSIT—MIDDLEMAN NECESSARY.—It is obvious that there can be no *transitus*, and therefore no stoppage *in transitu*, without the interposition of a middleman between the vendor and vendee: *Cooper v. Bill*, 3 Harl. & C. 722. The beginning of the transit is when the goods are delivered to the middleman for carriage to the vendee. The middleman is the agent of the vendor for the purpose of delivery: *Calahan v. Babcock*, 21 Ohio St. 281; and so are all to whose hands the goods successively come, so long as their duty with respect to the goods is that of expediting the carriage. So, whether the custodian for the time being is a carrier, or a wharfinger, or warehouseman: *Atkins v. Colby*, 20 N. H. 154; *Smith v. Goss*, 1 Camp. 282. So long as the goods are in the hands of those whose duty it is to forward them towards their original destination, and not merely to keep them, the

transit is not ended: *Guilford v. Smith*, 30 Vt. 49. So where the transit is delayed by order of one of the vendors of goods included in the same consignment, and the goods are thus stopped in the hands of a warehouseman to await the further orders of such vendor: *Hays v. Mouille*, 14 Pa. St. 48.

DELIVERY ON BOARD VESSEL OR OTHER VEHICLE OF VENDEE.—There is some disagreement on the point as to whether or not a delivery on board the vendee's own vessel is a delivery to him so as to preclude stoppage *in transitu*. In a number of American cases the doctrine is laid down, that where the goods are delivered on board the vendee's vessel to be transported to him, they are *in transitu* until they reach him; whereas, if they are to be carried to a foreign market, or to another party, there is no *transitus*, the master of the vessel being regarded as the vendee's agent to receive delivery: *Stubbs v. Lund*, 5 Am. Dec. 63; *Haley v. Stubbs*, 6 Id. 29; *Parker v. McJee*, 1 Id. 656; *Rowley v. Bigelow*, 23 Id. 607; *Newhall v. Vargas*, *post*. The rule of the English and some of the American cases on this point, however, is, in general, that a delivery on board a ship or other vehicle of the vendee, the vendor having knowledge of the fact that it belongs to the vendee, is a delivery to the vendee, to whatever port the goods are consigned, and there is no *transitus*, unless the effect of the delivery is restrained by taking the bill of lading in such a way as to make the master of the vehicle merely an agent for carriage, as by making the goods deliverable to the vendor's order: *Benj. on Sales*, secs. 841, 842; *Hutch. on Carriers*, sec. 419; *Ogle v. Atkinson*, 4 Taunt. 759; *Van Casteel v. Booker*, 2 Ex. 691; *Turner v. Trustees*, 6 Id. 543; *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, L. R., 5 Ch. Div. 205; S. C., 46 L. J., Ch. 418; 36 L. T. (N. S.) 395; 25 W. R. 457; *Schotmans v. Lancashire etc. Co.*, L. R., 2 Ch. App. 332; *Bolin v. Hufnagle*, 1 Rawle, 9; *Sturtevant v. Orser*, 24 N. Y. 538. And this seems to us decidedly the more reasonable doctrine. The same rule applies where the vessel has been chartered by the purchaser, if, by the terms of the charter party, the charterer is owner for the voyage; but if he has merely, in effect, contracted with the carrier, as carrier, for the transportation of the goods, a delivery on board such vessel is the same as a delivery on board any general ship, and a *transitus* is interposed between buyer and seller: *Benj. on Sales*, sec. 843 *et seq.*; *Inglis v. Usherwood*, 1 East, 515; *Bohlingk v. Inglis*, 3 Id. 381; *Berndtson v. Strang*, L. R., 4 Eq. 481. Delivery to a carrier nominated and hired by the purchaser, as carrier, is not such a delivery to the purchaser as to defeat the right of stoppage *in transitu*, even though the ultimate destination of the vessel is not communicated to the vendor: *Ex parte Rosevear China Clay Co.*; *In re Cock*, L. R., 11 Ch. Div. 560; S. C., 48 L. J., Bank. 100; 40 L. T. (N. S.) 730; 27 W. R. 591. In that case James, L. J., said: "The principle is this—that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right, which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier." The whole question turns upon the character in which the person to whom the goods are delivered receives them. If he receives them as an agent for carriage, though he is employed by the vendee, the right of stoppage *in transitu* attaches: *Aguirre v. Parmelee*, 22 Conn. 473.

GOODS IN HANDS OF WAREHOUSEMAN, ETC., AT INTERMEDIATE STATION.—Where the goods are in the hands of a wharfinger, warehouseman, or forwarder at an intermediate stage between the original inception of the transit and its termination, they are subject to the right of stoppage *in transitu*,

because such person is merely an agent to expedite the carriage: *Markwald v. Creditors*, 7 Cal. 213; *Blackman v. Pierce*, 23 Id. 508; *Buckley v. Furniss*, 15 Wend. 137; S. C., 17 Id. 504; *Covell v. Hitchcock*, 23 Id. 611; *Mills v. Ball*, 2 Bos. & Pul. 457; *Smith v. Goss*, 1 Camp. 282. So where they are in the hands of a warehouseman at the time of the sale, and are transferred to the purchaser's name in the warehouseman's books, but the seller is to have them forwarded, and to pay charges, taxes, etc., they are to be deemed in transit until they reach their ultimate destination: *Mohr v. Boston etc. R. R. Co.*, 106 Mass. 67.

VENDEE MAY INTERCEPT GOODS AND TERMINATE TRANSIT.—A purchaser of goods may undoubtedly defeat the vendor's right to stop them *in transitu* by taking possession of them at an intermediate point: Story on Sales, sec. 342 as Angell on Carriers, secs. 345, 346, 347; *Mills v. Ball*, 2 Bos. & Pul. 457. As where he gives them a new destination at such intermediate point, in order to make them security to a party who assisted him to procure their release from an attachment: *Wood v. Yeatman*, 15 B. Mon. 270. Or where he takes samples of them and requests the carrier to let them remain in his warehouse for further directions: *Foster v. Frampton*, 6 Barn. & Cress. 107. Or directs their delivery at such intermediate point to a purchaser from him, and they are delivered accordingly: *Stevens v. Wheeler*, 27 Barb. 658. And, generally, whenever at any intermediate point in the transit the goods are received by one as agent of the vendee, with authority to give them a new destination, and not merely to forward them to their original destination, the transit is thereby determined, so far as the vendor's right of stoppage is concerned: *Cabern v. Campbell*, 30 Pa. St. 254. The purchaser's assignee may also terminate the transit by taking possession at an intermediate point: *Jones v. Jones*, 8 Mea. & W. 431.

WHERE GOODS HAVE ARRIVED AT DESTINATION.—Notwithstanding their arrival at the destination appointed for them, goods are to be deemed in transit so far as the vendor's right to stop them is concerned, so long as they remain in the carrier's possession as carrier; that is to say, until the carrier has either delivered them or consented to hold them as the purchaser's agent for custody, or the purchaser has performed some act of ownership respecting them: *Naylor v. Dennie*, 19 Am. Dec. 319; *Seymour v. Newton*, 105 Mass. 272; *Inlee v. Lane*, 57 N. H. 454; *Tucker v. Humphrey*, 4 Bing. 516. And the transit continues while the goods are on board a lighter in course of transmission to the wharf: *Jackson v. Nichol*, 5 Id. (N. C.) 508.

DELIVERY TO PUT AN END TO TRANSIT.—The delivery required to defeat a vendor's right of stopping goods *in transitu* differs from that required merely to pass the property in the goods and put them at the buyer's risk: Story on Sales, sec. 331. It must be either actual delivery or its equivalent: *Donath v. Broomhead*, 7 Pa. St. 301; *Huys v. Mouille*, 14 Id. 48; *Alsberg v. Latta*, 30 Iowa, 442; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580. Formerly, indeed, it was held that to constitute such delivery, there must be a "corporal touch" of the goods: Hilliard on Sales, 285. This expression must be understood figuratively, however, if it is ever true: Angell on Carriers, sec. 345. At all events it is repudiated in the later cases. Lord Kenyon, in *Wright v. Leves*, 4 Esp. 82, admitted having on one occasion made the remark that a "corporal touch" was necessary, and expressed a wish that "the expression had never been used," because it said "too much." "All that is necessary," said he, "is that the consignee exercise some act of ownership on the property consigned to him." To the same effect is *Mottram v. Hoyer*, 1 Denio, 483. So far as an actual delivery to the vendee, or his authorized agent, is

concerned, there can be no question that it terminates the right of stoppage *in transitu*. The vendor's right is gone as soon as the goods actually come to the hands of the vendee or his administrators or other representatives: *Conyers v. Ennis*, 2 Mason, 236. Such actual delivery will be deemed made whenever the goods come to the hands of a warehouseman who has express or implied authority from the vendee to receive and hold them as his agent, and who does so receive and hold them: *Scott v. Pettit*, 3 Bos. & Pul. 469; *Dodson v. Wentworth*, 4 Man. & G. 1080; *Wentworth v. Outhwaite*, 10 Mee. & W. 436; *Sawyer v. Joslin*, 20 Vt. 172; *Guilford v. Smith*, 30 Id. 49; *Hoover v. Tibbits*, 13 Wis. 79. But a delivery to a warehouseman, not as the purchaser's agent, but in the ordinary course of business as a middleman, is not a delivery to the purchaser: *O'Neil v. Garrett*, 6 Iowa, 480. The mere transfer of the goods to a warehouse at the end of the route to await the payment of charges is not, *ipso facto*, a delivery so as to cut off the right of stoppage *in transitu*: *Calahan v. Babcock*, 21 Ohio St. 281. Where the warehouseman receives the property, as agent for the carrier, to hold until the freight and other charges are paid, the *transitus* still continues: *Hoover v. Tibbits*, 13 Wis. 79. To constitute a termination of the transit by landing the goods at a wharf where the vendee is accustomed to have his goods landed, in accordance with his directions, it must appear that he intended the wharfinger to hold the goods as his agent until he communicates instructions as to forwarding them: *James v. Griffin*, 1 Mee. & W. 20; S. C., 2 Id. 623. Where the carrier lands the goods at a wharf at which the consignee is not in the habit of receiving goods, acting under the advice, but not the specific instructions, of the consignee's clerk, the consignee being absent, and the goods are entered in the wharfinger's book with "freight and charges" set opposite, but no consignee named, the transit is not deemed at an end: *Edwards v. Brewer*, 2 Mee. & W. 375. Delivery of the goods at their port of destination to a carrier to whom the vendee has indorsed the bill of lading as his agent to receive them, is a delivery to him and terminates the transit: *Ex parte Gibbs*; *In re Whitworth*, L. R., 1 Ch. Div. 101; S. C., 45 L. J., Ch. 10; 33 L. T. (N. S.) 479; 24 W. R. 298.

GOODS AWAITING VENDEE'S FURTHER ORDERS.—Wherever the goods reach the hands of agents of the vendee authorized to receive them and give them a new destination, or awaiting his orders as to their future destination, they are deemed delivered and the transit is ended: *Pottinger v. Hecksher*, 2 Grant, 309; *Cabeen v. Campbell*, 30 Pa. St. 254; *Biggs v. Barry*, 2 Curt. 259; *Dixon v. Baldwin*, 5 East, 175; *Leeds v. Wright*, 3 Bos. & Pul. 320; *Valpy v. Gibson*, 4 Com. B. 837. But where the goods are in the possession of a shipping agent appointed by the vendee to await his instructions, not as to their destination, but as to the mode of shipment to their original destination, they are still *in transitu*: *Harris v. Pratt*, 17 N. Y. 249. Where goods were shipped on a vessel chartered by the vendor and bound, as stated in the bill of lading, "for Falmouth, Cowes, or Queenstown, for orders," the goods being made deliverable unto order or assigns, and the vessel stopped at Falmouth, where, in accordance with the instructions of the vendor, the master wrote to the vendee announcing his arrival, and asking for further orders, but before they were received the vendee stopped payment, it was held that the vendor's right of stoppage was not lost: *Fraser v. Witt*, L. R., 7 Eq. 64. It was laid down in that case that a fresh destination must be communicated to the goods by the vendee to take away the vendor's right of stoppage.

ENTRY OF THE GOODS AT THE CUSTOM-HOUSE without paying the duties

does not terminate the transit, but it is otherwise where they are placed in a public store under the warehousing system: *Mottram v. Heyer*, 5 Denio, 629; *Northey v. Field*, 2 Esp. 613. Goods stored in the custom-house in consequence of the loss of the invoice are *in transitu*, and subject to the vendor's right of stoppage, though the freight is paid, because by reason of the loss of the invoice they could not be entered at the custom-house, and the purchaser could not therefore obtain actual possession: *Donath v. Broomhead*, 7 Pa. St. 301.

CARRIER BECOMES AGENT OF VENDEE, WHEN.—Where goods are deposited in the carrier's warehouse at the end of the route, to await the purchaser's orders, and the purchaser is notified thereof, and assents thereto, the transit is at an end and the carrier is simply a depositary for such purchaser: *Ex parte Catling*, *In re Chadwick*, 29 L. T. (N. S.) 431; *Ex parte Gouda*, *In re Millo*, 20 W. R. 981. See also *Allan v. Gripper*, 2 Crompt. & J. 218. Indeed, in some cases it is laid down in broad terms that where goods are stored by a carrier at the end of his route as agent for the purchaser, the right of stoppage *in transitu* is at an end, without saying anything as to notice to the vendee: *Fetridge v. Piper*, 40 Iowa, 627; *Clapp v. Peck*, Sup. Ct. of Iowa, 11 Rep. 462. This might seem to imply that the carrier, without any express authority from the vendee, or any authority implied from a course of dealing or from the vendee's assent after notice of such storage, could constitute himself the agent of the vendee for this purpose. But if so, these cases go too far. The carrier's relation to the goods can not be changed to the prejudice of the vendor except by contract with the vendee: *Reynolds v. Boston etc. R. R.*, 43 N. H. 580. Therefore, where no notice is given to the vendee of the arrival of the goods, by reason of his having absconded, their being stored in the carrier's warehouse subject to his order will not terminate the transit: *Ex parte Barrow*, *In re Wordsell*, L. R., 6 Ch. Div. 783; S. C., 46 L. J., Bank. 71; 36 L. T. (N. S.) 325; 25 W. R. 466. So where the notice was given to a general truckman who had a standing order from the consignees to bring away goods addressed to them, but nothing was done by him, and the consignees had absconded, there being no contract between the carrier and the consignees: *Inalee v. Lane*, 57 N. H. 454. Notice by an intermediate carrier of goods marked for further destination which it is his duty to forward over another line from the end of his route, that he holds the goods for the disposal of the consignee and will be liable only as a warehouseman, but stating that he will forward the goods, does not terminate the transit, so as to prevent a stoppage by the vendor: *Ex parte Watson*, *In re Love*, L. R., 5 Ch. Div. 35; S. C., 46 L. J., Bank. 97; 36 L. T. (N. S.) 75; 25 W. R. 489.

PART DELIVERY.—A delivery of part of the goods to the consignee does not affect the vendor's right to stop the residue, unless such partial delivery was intended to operate as a delivery of the whole: Benj. on Sales, sec. 857; *Buckley v. Furniss*, 17 Wend. 504; *Secomb v. Nutt*, 14 B. Mon. 261; *Tanner v. Scovell*, 14 Mees. & W. 28; *Ex parte Cooper*, *In re McLaren*, L. R., 11 Ch. Div. 68; S. C., 48 L. J., Bank. 49; 40 L. T. (N. S.) 105; 27 W. R. 518. Otherwise where such delivery was intended to operate as a delivery of the whole: *Stubey v. Heyward*, 2 H. Bl. 504; *Jones v. Jones*, 8 Mees. & W. 431; *Stevens v. Wheeler*, 27 Barb. 658.

ACTS OF OWNERSHIP AS EVIDENCE OF POSSESSION.—Among the acts of ownership which have been held sufficient evidence of the vendee's having taken possession so as to terminate the vendor's right, are: Taking samples and paying warehouse rent, or engaging for its payment: *Wright v. Lewes*, 4 Esp. 82; *Foster v. Frampton*, 6 Barn. & Cress. 107. Taking samples, how-

ever, is an equivocal act: *Jones v. Jones*, 8 Mee. & W. 431, *per Parke*, B. So, marking and measuring the goods is evidence of taking possession: *Cooper v. Bill*, 3 H. & C. 722; S. C., 34 L. J., Ex. 151. Where the purchaser having received the shipping papers of goods which are at sea, warehouses them in his own name: *Parker v. Byrnes*, 1 Low, 539. A resale of the goods and giving them a new destination, with the vendor's knowledge, is a sufficient proof of delivery to defeat the right to stop *in transitu*: *Eaton v. Cook*, 32 Vt. 58. So, causing the goods to be repacked and sending part of them away, while in the packer's hands: *Leeds v. Wright*, 3 Bos. & Pul. 320. So, where the goods are sent back to the vendor to be repacked: *Valpy v. Gibson*, 4 Com. B. 837. So, where the vendor at the time of the sale ships the goods to a third person in purchaser's name as consignor at the purchaser's request, there is such an assumption of dominion as to preclude a stoppage *in transitu*: *Treadwell v. Aydlett*, 9 Heisk. 388. It must be borne in mind that when the goods remain in the hands of the carrier, such acts as marking, taking samples, etc., will not operate to change the possession without the assent of the carrier: *Whitehead v. Anderson*, 9 Mee. & W. 518. In any case, if the carrier refuses to deliver the goods, or postpones the delivery, the transit continues: *Allen v. Mercier*, 1 Ash. 103; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580; *Coventry v. Gladstone*, L. R., 6 Eq. 44. So where, after having begun to unload the goods, he hears that the vendee has stopped payment, and thereupon reloads the goods and returns them to his own premises: *Crawshaw v. Eades*, 1 Barn. & Cress. 181. So, if the delivery is prevented by the vessel's being ordered into quarantine after the purchaser's assignees have taken constructive possession: *Holst v. Pownal*, 1 Esp. 240.

VENDOR'S REFUSAL TO RECEIVE THE GOODS.—Where the vendee refuses to receive the goods, either because he has learned of his own insolvency, or because they are of inferior quality, or indeed for any other reason, the vendor's right continues, and he may retake the goods: *Grout v. Hill*, 4 Gray, 361; *Morris v. Shryock*, 50 Miss. 590, 599; *More v. Lott*, 13 Nev. 376; *Sturtevant v. Orser*, 24 N. Y. 538; *Bolton v. Lancashire etc. Co.*, L. R., 1 Com. Pl. 431. Perhaps, however, this is, more properly speaking, a rescission of the contract, if the vendor assents to the refusal by retaking the goods: *Sturtevant v. Orser*, 24 N. Y. 538.

INDORSEMENT OF BILL OF LADING DEFEATS, WHEN.—Where the vendee has possession of the bill of lading, with the vendor's consent, and indorses it to a *bona fide* purchaser of the goods for value, this operates as a transfer of the goods so as to defeat the right of stoppage *in transitu*: Benj. on Sales, sec. 862; *Lickbarrow v. Mason*, 2 T. R. 63; S. C., 1 H. Bl. 257; 6 East, 21; 1 Sm. Lead. Cas. (6th Am. ed.) 1039 and note; *Chandler v. Fulton*, 10 Tex. 2; *Audenreid v. Randall*, 3 Cliff. 99; *Dows v. Perrin*, 16 N. Y. 325; *Rawls v. Deahler*, 4 Abb. App. Dec. 12; *Walter v. Ross*, 2 Wash. C. C. 233. But the indorsement must be *bona fide*, and not to carry out an apparent sale fraudulently made to defeat the vendor's right: *Rosenthal v. Dessau*, 11 Hun, 49. An assignment of the bill of lading for value to one who has notice that the goods are not paid for and that the original purchaser is insolvent, is unavailing: *Vertue v. Jewell*, 4 Camp. 31; *Chandler v. Fulton*, 10 Tex. 2. The party making the indorsement must also have authority to transfer it: *Gurney v. Behrend*, 3 El. & Bl. 622. But if the vendor indorses and delivers the bill of lading to the vendee, and the latter redelivers it to the vendor as security for the price, and afterwards obtains possession of it by a fraudulent representation, and indorses it to a *bona fide* purchaser, the vendor's

right is gone: *Pease v. Gloahec*, L. R., 1 P. C. App. 219. Where the consignee is merely an agent or factor for the shippers, he may defeat the right of stoppage *in transitu* by an indorsement of the bill of lading to a *bona fide* purchaser: *Audenreid v. Randall*, 3 Cliff. 99. An assignment of the bill of lading as security for an antecedent debt does not defeat stoppage *in transitu*: *Chandler v. Fulton*, 10 Tex. 2; *Lee v. Kimball*, 45 Me. 172; *Lesassier v. The Southwestern*, 2 Woods, 35; *Newsom v. Thornton*, 6 East, 17. Indeed, the better opinion is, that an antecedent debt is not a sufficient consideration for an absolute transfer of the bill of lading so as to preclude stoppage *in transitu*: *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393. There is no valid reason why the vendee should be permitted, by such a transfer, to prefer some other creditor to the unpaid vendor, and to appropriate property obtained from the latter to the payment of the former's claim. But a contrary doctrine is laid down in *Leask v. Scott*, L. R., 2 Q. B. Div. 376. See also *Lee v. Kimball*, 45 Me. 172. Where the bill of lading is indorsed to one *bona fide* as security for present advances, the vendor is entitled to the surplus after the secured claim is paid: *In re Westzynthius*, 5 Barn. & Adol. 817; *Spalding v. Rudeny*, 6 Beav. 376. An indorsement of the bill of lading is necessary to defeat the right: *Chandler v. Fulton*, 10 Tex. 2. A mere resale by the vendee to one who does not get possession is not sufficient: *Craven v. Ryder*, 6 Taunt. 433. Nor an assignment for the benefit of creditors: *Bell v. Moss*, 5 Whart. 189. Nor a mere delivery of the bill of lading without acceptance, etc.: *Audenreid v. Randall*, 3 Cliff. 99. Much less where possession of the bill of lading is obtained by fraud, without a sale of the goods: *Dows v. Perrin*, 16 N. Y. 325.

ATTACHMENT, EXECUTION, OR OTHER LIEN AGAINST PURCHASER DOES NOT DEFEAT.—The vendor's right of stoppage *in transitu* is paramount to all liens against the purchaser: *Hilliard on Sales*, 289; *Blackman v. Pierce*, 23 Cal. 506; even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee: *Oppenheim v. Russell*, 3 Bos. & Pul. 42. So to a claim for freight on the same goods by an assignee of the vessel while *in transitu*, where the goods were originally shipped free, because the vessel belonged to the consignee: *Mercantile etc. Bank v. Gladstone*, L. R., 3 Ex. 233. Nor does the carrier's lien for freight on the particular goods defeat the vendor's right: *Jackson v. Nichol*, 5 Bing. (N. C.) 503. Such claim for freight must, however, be first paid. An attachment or execution against the vendee does not preclude stoppage *in transitu*, for this is not a taking possession by the vendee's authority, the proceeding being *in invitum*: *Naylor v. Dennie*, 19 Am. Dec. 319; *Smith v. Goss*, 1 Camp. 282; *O'Neil v. Garrett*, 6 Iowa, 480; *Rucker v. Donovan*, 13 Kan. 251; S. C., 19 Am. Rep. 84; *Wood v. Yeatman*, 15 B. Mon. 270; *O'Brien v. Norris*, 16 Md. 122; *Seymour v. Newton*, 105 Mass. 272; *Durgy etc. Co. v. O'Brien*, 123 Id. 12; S. C., 5 Cent. L. J., 147; *Morris v. Shryock*, 50 Miss. 590; *More v. Lott*, 13 Nev. 376; *Atkins v. Colby*, 20 N. H. 154; *Insee v. Lane*, 57 Id. 454; *Buckley v. Furniss*, 15 Wend. 137; *Covell v. Hitchcock*, 23 Id. 611; *Benedict v. Schaettle*, 12 Ohio St. 515; *Calahan v. Babcock*, 21 Id. 281; *Hays v. Mouille*, 14 Pa. St. 48; *Kitchen v. Spear*, 30 Vt. 545. But the vendor can not reclaim the goods without paying the freight advanced by the officer who seized them: *Rucker v. Donovan*, 13 Kan. 251; S. C., 19 Am. Rep. 84.

STOPPAGE, HOW EFFECTED.—The right of stoppage *in transitu* is a right adverse to the vendee, and therefore, where the goods are reclaimed pursuant to an amicable arrangement between the vendor and vendee, there is no stoppage *in transitu*, and the doctrines of the law relating to this subject do

not apply: *Stiffen v. Wray*, 6 East, 371; *Ash v. Putnam*, 1 Hill, 302. But this probably means no more than that there shall be a positive, affirmative exercise of the vendor's right; for, as we have already seen, the fact that the consignee consents to the stoppage by refusing to receive the goods does not prevent such stoppage. A relinquishment of the consignment simply leaves the goods *in transitu* and does not debar the vendor from stopping the goods: *Naylor v. Dennie*, 19 Am. Dec. 319. There must be an actual stoppage to defeat the rights of creditors of the vendee: *Mactier's Adm'rs v. Frith*, 21 Id. 262. If the vendor takes actual possession the right is effectually exercised: *Stanton v. Eager*, 16 Pick. 467. So where he expressly demands the goods of the carrier or gives him notice of his intention to reclaim the goods: *Rucker v. Donovan*, 13 Kan. 251; S. C., 19 Am. Rep. 84. A demand is not necessary, but a notice not to deliver will suffice: *Newhall v. Vargas*, *post*; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580; *Jones v. Earl*, 9 Mee. & W. 518. The demand or notice must be made upon or given to the middleman or carrier, or to his agent, who has the immediate possession, and notice to the consignee is not sufficient: *Mottram v. Heyer*, 5 Denio, 629; *Rucker v. Donovan*, 13 Kan. 251; S. C., 19 Am. Rep. 84; *Whitehead v. Anderson*, 9 Mee. & W. 518. Notice to the assignees of the consignee was, however, erroneously, as we think, held sufficient in *Bell v. Moss*, 5 Whart. 189. Where notice is given to the carrier at a distance from his agent who has the immediate custody of the goods, it must be in season to enable him to communicate with such agent: *Whitehead v. Anderson*, 9 Mee. & W. 518. Bringing replevin, after demand, against an officer attaching the goods is a sufficient exercise of the right: *Atkins v. Colby*, 20 N. H. 154; *Benedict v. Schaettle*, 12 Ohio St. 515. A general agent of the vendor, or one who is his agent with respect to the particular consignment, may exercise the right of stoppage without special authority: *Newhall v. Vargas*, *post*; *Bell v. Moss*, 5 Whart. 189; *Chandler v. Fulton*, 10 Tex. 2; *Reynolds v. Boston etc. R. R.*, 43 N. H. 580. So where the stoppage is made by one acting as agent, and a power of attorney to him has already been given which does not reach him until afterwards: *Hutchings v. Nunes*, 1 Moore P. C. (N. S.) 243. So a stoppage by one acting as agent without authority may be made good by a subsequent ratification before the vendee or his assignees have obtained or demanded possession: *Durgy etc. Co. v. O'Brien*, 123 Mass. 12; S. C., 5 Cent. L. J. 147; *Chandler v. Fulton*, 10 Tex. 2. But not, it seems, where the ratification occurs after the vendee or his assignee has obtained or demanded possession: *Bird v. Brown*, 4 Ex. 786. One who is indorsee of the bill of lading for that purpose may stop the goods in his own name: *Morison v. Gray*, 2 Bing. 260. A commission merchant in whose hands the goods are, may, according to *Chandler v. Fulton*, 10 Tex. 2, exercise the right of stoppage, as agent of the vendor by refusing to deliver them. This seems to us, however, wholly at variance with the theory of stoppage *in transitu*. How can the same person be a forwarder of the goods so as to make them *in transitu* while in his custody, and at the same time be the vendor's agent to stop them? How can the same individual be the vendor's agent for the purpose of giving notice of stoppage, and at the same time the carrier to receive such notice?

DELIVERY AFTER NOTICE OF STOPPAGE.—Where a factor delivers goods after orders from his principal to stop them *in transitu*, he is liable for any loss occasioned thereby: *Howatt v. Davis*, 7 Am. Dec. 681. If the goods are delivered to the vendee or his assignees by mistake, after notice of stoppage, the latter are liable in trover for their value: *Litt v. Conley*, 7 Taunt. 169.

KEASY v. CITY OF LOUISVILLE.

[4 DANA, 154.]

MUNICIPAL CORPORATION MAY REGRADE A STREET whenever it may deem such an improvement useful to the local public.

SUCH CORPORATION IS NOT LIABLE IN DAMAGES FOR MERE INCONVENIENCE occasioned by the regrading of a street, to a lot-owner who has built his house to correspond with the grade of such street as originally established, where there is no intrusion upon his property nor any deprivation or obstruction of his enjoyment of any vested right therein, and where he is not thereby divested of its use.

THERE IS NO IMPLIED AGREEMENT NOT TO CHANGE THE GRADE of a street once fixed by a municipal corporation, between the corporation and lot-owners along the street.

ACTION on the case, from the Jefferson county circuit court. The opinion states the case.

Nicholas, for the plaintiff.

Guthrie, for the defendant.

By Court, ROBERTSON, C. J. Daniel Keasy, owning a lot on Jefferson street, in Louisville, on which he had erected a small wooden house, since that street had been graded and paved, under the charter of incorporation of 1828, sued the city, in an action on the case, for elevating the grade about three feet above the level of his lot, after he had thus improved it, correspondently with the first grade, in consequence of which he had, as he avers, to fill up his lot, and reconstruct his house, and had been, in other respects, subjected to inconvenience and damage.

The facts as alleged, having been proved on the trial, on the general issue, the court instructed the jury that, if they should believe, "from all the evidence, that the mayor and councilmen of the city of Louisville had the street filled or raised for the purpose of carrying off the water in that part of the city, and the injury complained of arose from filling or raising, they ought to find for the defendant."

Verdict and judgment were accordingly rendered in bar of the action. And it is that judgment which the plaintiff in error now seeks to reverse.

The constitutional power to incorporate the citizens of Louisville into a municipal body politic, possessing, as every artificial as well as natural being ought to possess, a self-will and the faculty of acting, of regulating its own affairs, and of governing its constituent members, as far as may be consistent

with its charter, the federal and state constitutions, and the general laws of the commonwealth, and as may be proper for effectuating the legitimate ends of its creation, has been conceded by the plaintiff in error, in the fact of suing the corporation, and has, also, been necessarily presupposed by the circuit judge, in giving his hypothetical instruction to find for the city as defendant. And, not doubting either the power of incorporating the city, or the incidental corporate right, either inherent, or derived from legislative authorization, to grade and pave the streets of the city, we are, also, of the opinion that the corporation had authority to regrade and pave Jefferson street, or any other street, whenever the municipality might have deemed such an improvement useful to the local public.

The power of the commonwealth over the streets, as well as over the local police, having been, not alienated, but delegated, or rather deferred, to the city itself, it was not material to the legal authority of the order for changing the grade of Jefferson street, that such a change was, in fact, necessary for draining water, or for any other purpose. The city decided that it was proper—and personal inconvenience or private judgment, however repugnant to the policy of regrading, could not have affected the legal validity of the order.

But the public right to regulate the common highways of the city, is, of course, not arbitrary and unlimited; far from it. Private rights must be regarded. The public, like a common person, must so use its own as not to injure another's property. It can not take private property for public use without paying a just equivalent; nor can it disturb any personal right of enjoyment. But, without touching the plaintiff's lot, or in any way encroaching upon it, or interfering with any prescriptive right to light, or to private way, the city had as clear and perfect authority to raise its street higher, or sink it lower, than the level of his lot, as he would undoubtedly have had to elevate or sink his ground, without touching or otherwise injuring, or interfering with the public street.

On the trial of the case, there was no evidence tending, in any degree, to show that the plaintiff's lot had been intruded on or touched; or that the elevation in the grade of the street caused water to run or remain upon it, or rendered it less salubrious, or divested him of any vested right, or unjustly obstructed the enjoyment of any such right; and mere inconvenience, to which, in his opinion or in fact a public im-

provement in his city may have subjected him, is not sufficient *per se* to entitle him to damages. Every citizen takes and holds private property in land subject to the paramount public rights, and to the contingency of adventitious enhancement or diminution in value, resulting from the exercise of the public power for the common good, in any manner which shall not deprive him of property, nor disturb him in the lawful use of anything which should, of right, be his. A citizen can not be compelled to pay for private advantage arising from the location of a public way; nor—unless his property be taken, or, in some way, encroached on, so as to divest him of some exclusive individual right—can he be entitled to damages for incidental disadvantage. If the city possess the power to shut up Jefferson street, and should exercise it, the reclusion would subject the plaintiff and others also, to much more inconvenience and actual loss than any which could have been occasioned by the elevation of the grade; but, the power conceded, a legal right to damages for the total obliteration of the street could not be maintained. It would have been *damnum absque injuria*, loss, not injury—inconvenience, not wrong—to which every citizen must submit, and to something like which every citizen does submit, for the public good.

As to the legality or propriety of some of the modes of making public improvements in the city of Louisville, this court has no right to give any opinion in this case. The means employed for effecting an allowable end may be inappropriate, or even unauthorized, but the end itself, when accomplished, is not therefore the less unexceptionable. Jefferson street has been regraded—by what instrumentality is not here material; the end was lawful; the city had a right to effect it in some mode; and having done so, without injury to any of the plaintiff's private rights (as we are bound to presume from this record), he has no legal title to demand any damages for an accidental consequence, arising from the rightful exercise of a public power, without any tortious, or negligent, or unjust act or omission.

We have not said, nor can we say, that a citizen may not be entitled to damages for a deprivation of the use of his property by a public way which may not take, or even touch, any of his land. But the case in which such a right to damages might be recognized, must be an extreme and peculiar one. And this is not such an one, but is an ordinary case occurring, in a greater or less degree, frequently—almost constantly; and the

public could not well bear the heavy and vexatious burden of such demands as would forever arise from such cases, were they admitted to be cases of private injury, for which an action could be maintained. Nor could individual citizens be justly subjected to the reciprocal claims of the public against them, for the like inconvenience arising from their lawful use and enjoyment of nothing but their own private property. And hence, as a general rule, the law gives no damages to either party, when there has been no trespass, nor any nuisance which might have been avoided without a surrender of a just and necessary right.

If, as we have supposed and decided, the city had authority to change the first grade, there could have been no implied agreement, when that was fixed, that it would never be changed, any more than such an agreement between the United States and the owners of land on the Cumberland road, never to change the location or grade of that national way, could be deemed as having been implied.

Wherefore, it seems to us, that the plaintiff altogether failed to prove any fact from which the jury would have had a right to infer that he had a legal right to damages. And therefore, it is our opinion that however unnecessary or inappropriate the hypothetical assumptions of the court may be deemed to have been, the instruction was not erroneous to the plaintiff's prejudice—and the judgment consequently must remain unreversed.

STREETS, RIGHT OF MUNICIPAL CORPORATION TO IMPROVE.—The principal case, among a large number of others, is cited as an authority on this point in *Pontiac v. Carter*, 32 Mich. 167, and is approved in *City of Louisville v. Louisville Rolling Mill Co.*, 3 Bush, 416. In *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 373, the case is referred to as an authority for the position, that where land is taken for a public improvement, the owner is entitled to the extent of its value, without any deduction on account of any benefit or advantage accruing to other property of such owner by reason of the improvement. That point, however, was not involved in the principal case.

BANK OF COMMONWEALTH v. McCHORD AND PAYNE.

[4 DANA, 191.]

WHERE A NOTE IS SIGNED IN BLANK, THE ADDITION OF ANOTHER OBLIGOR before it is filled up, without the knowledge or authority of the original signer, is not such an alteration as to render it void against him.

CHANGING THE DATE of such an instrument, where the date was not blank when signed, vitiates it, if the alteration is made without authority.

PETITION and summons, from Washington county circuit court. The case appears from the opinion.

Crittenden, for the plaintiff.

Wickliffe, for the defendants.

By Court, ROBERTSON, C. J. This is a petition and summons against the defendants in error, on a note purporting to have been given by them and George Roberts to the bank of the Commonwealth. They pleaded that they had signed a blank note dated in August, the true date of their signature; and that, afterward, without their authority or knowledge, the date was altered, and the name of Roberts inserted, as a co-obligor. And, issue having been taken on those facts, they proved that some date in August, which had been erased, but was still legible, had been written with ink of the same kind and color as that with which their names had been subscribed, and that the substituted date had been apparently written when the note was filled up; and also, that the name of Roberts had been inserted in their absence, and not until about the time of the presentation of the note for discount, which was at least two months after they had signed it. But facts were also proved which conduced to show that, when the names of the defendants were subscribed, they intended to be only the sureties of Roberts.

The circuit judge, having instructed the jury in substance that, if they should believe the foregoing facts, they ought to find for the defendants, a verdict and judgment were accordingly rendered, in bar of the suit.

By signing the blank paper and delivering it, McChord and Payne gave an implied authority to fill it up with any sum. And, as it was not an obligation as long as it remained a blank and *in fieri*, the insertion of another co-obligor was not inconsistent with the general authority, resulting by implication of law, and was certainly no alteration of their obligation; because the paper defined no obligation until it had been filled and delivered to the bank; until which, it was a *carte blanche*, except so far as it was circumscribed by mercantile law and usage, and by what appeared upon it when it was signed by themselves. In the case of *Penick v. The Bank of Limestone*,¹ the note, when signed by Penick, was a full and perfect obligation; and therefore there could have been no implied authority to alter or add

¹ *Bank of Limestone v. Penick*, 2 Mon. 96; S. C., 15 Am. Dec. 126.

to it after he had subscribed his name; and consequently, when the name of another party was afterward added, it was not, as this court decided, the same obligation it was when he became bound. But in this case, there having been no definite obligation until after the blank had been filled, and the simple fact, that two persons only had subscribed, not implying that they were to be the only obligors, the superaddition of another name did not change their obligation, and was not inconsistent with the act of signing a blank paper, especially as there is some ground for inferring that they signed the blank with the expectation that they were to be bound only as the sureties of Roberts.

But if the date was not blank, there was not, we think, any implied authority to make the note of any other date than that which was affixed when McChord and Payne signed the paper. And if, therefore, the date was afterward changed without their consent, the note, with such substituted date, was not that which they had subscribed; and consequently, however unimportant the alteration may be deemed to have been, the plea of *non est factum* was sustainable.

The instruction given by the circuit judge, at the instance of the defendants, is, therefore, not considered erroneous. But there was error in refusing to instruct the jury, on the motion of the plaintiff, that there was an implied authority to add the name of Roberts as a co-obligor. And, as this court can not know the ground on which the jury found their verdict, the refusal to give that instruction asked by the plaintiff must be deemed prejudicial.

Wherefore, it is considered that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

ALTERATION OF INSTRUMENTS.—This subject is discussed in the note to *Woodworth v. Bank of America*, 10 Am. Dec. 267. See also *Litcher v. Bates*, 22 Id. 92; *Newell v. Mayberry*, 23 Id. 261; *Wheelock v. Freeman*, Id. 674, and *Vananken v. Hornbeck*, 25 Id. 509, and other cases in this series cited in the notes thereto. The case of *Bank of the Commonwealth v. McChord* is referred to in *Lisle v. Rogers*, 18 B. Mon. 535, as an authority for the doctrine that any alteration in a note, however unimportant, will avoid it, but it is said that the tendency of the modern decisions is to the effect that the alteration must be material. The same is held in *Terry v. Haslewood*, 1 Duv. 108, mentioning the principal case as being opposed to *Lisle v. Rogers*.

FILLING BLANKS IN INSTRUMENTS ALREADY SIGNED.—See the note to *Woodworth v. Bank of America*, 10 Am. Dec. 271, and *Stahl v. Berger*, 13 Id. 666 and note. As to whether a bond signed and sealed in blank and afterwards filled up, is valid or not, see *Sigfried v. Levan*, 9 Id. 427 and note; *Wiley v. Moor*, 17 Id. 696; *Gilbert v. Anthony*, 24 Id. 439; *Wynne v. Governor*,

Id. 448; *Perminter v. McDaniel*, 26 Id. 179. In *English v. Broneman*, 5 Ark. 382, the principal case is cited as an authority for the position that where one signs or indorses a note with blanks for the date, sum, etc., and intrusts it to the maker, he thereby constitutes him, by implication of law, his agent to fill up the blanks.

HANSON v. BUCKNER'S EX'R AND DEVISEES.

[4 DANA, 251.]

RECORD OF A SUIT INCLUDES THE DEPOSITIONS, exhibits, and papers used on the trial as well as the pleadings and decree, and where such record is offered in evidence in another suit, and the exhibits, proofs, and depositions therein are read without objection, all objections thereto are deemed waived in an appellate court.

CONSIDERATION OF NATURAL AFFECTION WILL SUPPORT A COVENANT OF WARRANTY in a deed by way of advancement, from a grandfather to the husband of his granddaughter, and an action may be maintained for a breach of such warranty.

VALUABLE CONSIDERATION EXPRESSED IN SUCH A DEED, with interest, is, it seems, the measure of damages for a breach of such warranty.

VOLUNTARY CONVEYANCE TO A CHILD OR GRANDCHILD of the grantor, he being indebted at the time, is fraudulent in law as to such pre-existing debts, without regard to the amount of the debts or of the property conveyed, or to the grantor's circumstances or intentions in making the conveyance.

EVICION, TO CONSTITUTE A BREACH OF A COVENANT OF WARRANTY, is sufficiently proved by showing a sale of the land under a decree against the grantor, a confirmation of the report of sale by the court, and a yielding up of possession, and purchase of the title by the warrantee, without an actual removal.

ESTOPPEL IS DEEMED WAIVED, IF NOT PLEADED, or taken advantage of by objection to the testimony which it would operate to exclude, where that course is proper.

GRANTEE IS NOT ESTOPPED FROM SHOWING THAT THE DEED WAS VOLUNTARY under which he claims, although a valuable consideration is expressed therein, where by reason of its being voluntary the land is decreed to be sold to pay a pre-existing debt of the grantor, and an action is brought on a warranty contained in the deed against the grantor's executor and devisees, the estoppel being discharged by the grantor's default in not paying the debt.

COVENANT, from Bracken county circuit court. The facts are stated in the opinion. •

Crittenden, for the plaintiff.

Morehead and Brown, for the defendants.

By Court, **EWING, J.** In 1819 Philip Buckner, for the consideration expressed in the deed, of five hundred dollars,

conveyed to Amos O. Hanson two hundred acres of land, with covenant of general warranty. After Buckner's death this suit was brought against his executor and devisees for an alleged breach of the warranty.

Defendants pleaded covenants performed, with leave to set up any matter in defense which could be specially pleaded, etc. After the plaintiff had closed his evidence, on the trial, the court, at the instance of the defendants' counsel, instructed the jury that "the evidence did not support the declaration, or show a good cause of action in him;" and also told the jury "there was no evidence of eviction by a superior adverse claim whatever," "and that the jury should find as in case of a nonsuit."

To these instructions and opinions the plaintiff excepted; and has brought the case to this court by writ of error. The bill of exception states that the plaintiff read, as evidence, the "record of a suit in chancery, in which John Brown was complainant, and the said Amos O. Hanson, etc., were defendants," by which said Brown had obtained a decree for the sale of, and had sold, one hundred acres of said two-hundred-acre tract conveyed to Hanson; in satisfaction of a debt due by Philip Buckner, the vendor, to said Brown, long prior to the date of said deed, upon the ground that said deed was voluntary as to said one hundred acres.

It is objected by the counsel for said devisees, that the exhibits and depositions in said record should not be regarded as having been used on the trial in the circuit court, but only so much thereof as was competent to show the fact of eviction. We think otherwise. The record means the whole record, and embraces all the parts of it which come under the denomination of the record. Which, by the repeated decisions of this court, includes the exhibits, depositions, and papers used on the trial, as well as the pleadings and decree. Although it was competent for the plaintiff to use only so much of said record as was necessary to show an eviction, unless said devisees had been parties, or were notified of the pendency of the suit; yet as the bill of exception shows that the record was read to the jury, and no objection seems to have been made to any part of it, and the whole record is copied into this record as having been read, we must conclude that the whole was read, and not a part of it. And if the exhibits, proofs, and depositions in said record were read without objection, we must regard all objections to them as waived, and treat them as a

part of the evidence upon which the instructions of the circuit court were predicated: *Devou v. Johnson*, 3 Bibb, 409.

Secondly. It is objected that if the whole of said record be regarded as used before the jury, that it defeats the plaintiff's right of action on his warranty: because it shows, that said deed, as to the one hundred acres of said land sold by Brown, was voluntary and without consideration, and nothing could be recovered for a breach of the warranty; and that, if the deed be regarded as conclusive of the fact, that the valuable consideration mentioned on its face, was given, then the recovery of Brown was unauthorized by law, and the eviction without paramount title, and no recovery can be had in that aspect of the case.

It appears that Philip Buckner, the grandfather of Hanson's wife, conveyed said one hundred acres to him, as a gift, by way of advancing his granddaughter.

It is well settled, that the consideration of natural affection is sufficient to sustain a covenant, and will warrant a recovery in law or equity. The relation of grandfather and granddaughter is within the principle, as was expressly settled by this court, in the case of *Stovall and Wife v. Barnett*, 4 Litt. 207. And we can not doubt that the grandson-in-law—especially when the conveyance, as in this case, was made to him by way of advancing the granddaughter—falls within the same principle.

It therefore matters not whether the warranty was founded on a valuable, or good consideration. The plaintiff's right of action for a breach thereof is the same. And though the conveyance may be so far voluntary, as to subject the property conveyed to the demands of the creditors, the warranty, between the parties, is good, and obligatory, to the same extent as if founded on a valuable consideration.

If it had been a deed of gift with covenant of warranty, the value of the land at the time of the gift, with interest thereon, would form the criterion of damages: 4 Litt. 207.

As it has been long since settled, that the value of the land, to be estimated by the consideration, when a valuable one is expressed on the face of the deed, is, with interest thereon, the criterion of damages, on a breach of warranty, it may have been, and was, probably, intended by the donor in this case, to insert a valuable consideration as his estimate of the value of the land conveyed; and consequently, the extent of his responsibility in case of the donee's eviction.

It is next objected, that the recovery of Brown was not justified by the proof and the law; and therefore the eviction was not rightful, or upon a paramount claim.

The evidence shows that Philip Buckner was indebted to Brown, as well as others, at and before the date of said conveyance; and that said deed, as to the one hundred acres sold, was founded upon no other consideration, than the natural love and affection of said Buckner to his granddaughter. Without detailing more of the testimony, we would remark, that if a party be indebted at the time of a voluntary conveyance to a child or grandchild, such conveyance is presumed to be fraudulent, as a conclusion of law, as to those debts.

And the presumption of law as to prior debts, does not depend upon the amount of the debts, the intentions, or the circumstances of the party conveying, or the amount of property conveyed. The law will not permit an inquiry to be made into these matters, or give to them any weight or influence. They might tend to embarrass the creditor and involve his debt in doubt and uncertainty. The law has, therefore, wisely cut off all inquiry, and treated all voluntary conveyances and settlements founded upon no other consideration than that of natural affection or blood, as nullities, whenever they stand in the way of pre-existent debts.

But subsequent creditors would be required to go so far, and only so far, in showing indebtedness on the part of the donor, as would raise a reasonable presumption of a fraudulent intent: *Read v. Livingston*, 3 Johns. Ch. 500 [8 Am. Dec. 520].

As Brown's debt, for which the land was sold, existed at the time of the conveyance, it overreached the conveyance, and the land conveyed was properly subjected to its payment.

We also think that, the circumstances proven are amply sufficient to show an eviction. The land was sold under a decree of the court; purchased by Payne; the report of sale returned to, and confirmed by the court; a deed ordered to be made to him, and possession yielded up to him by Hanson, who afterward purchased and took possession under his title. We can not conceive what more, in reason or common justice, could be required. Hanson was not bound to wait till he was forced out by the order of the court. To all reasonable purposes, his eviction would be complete by the sale under a decree, and the acceptance and confirmation of the report of sale by the court, as it would be by a judgment in ejectment, without actual removal from the possession by *habere facias possessionem*.

But another question, of more doubt and difficulty of solution, has suggested itself to our reflections, in the examination of this record: that is, whether the plaintiff was not estopped, by the consideration expressed in the deed, from proving the facts necessary to show that Brown's recovery, on the ground of the deed being voluntary, was rightful; or whether he can, consistent with his own deed, prove that the conveyance was voluntary as to the one hundred acres; which proof alone will make out the rightful recovery of Brown, which is essential to his right of recovery on his warranty.

In relation to the record as now presented, we have no difficulty. As an estoppel concludes a party from proving the truth, it should never be looked on in a very favorable light, or permitted to operate in doubtful cases, or where the party relying upon it has not brought himself strictly within the rules which justify its application. Hence, it has been determined "to make an estoppel operative, it must be taken advantage of in proper time, and in a legitimate manner."

If the matter of estoppel appears on the record, it may be taken advantage of by demurrer, and when it does not appear, it should generally be specially pleaded and relied on: 2 Marsh. 144. And we would conclude that when, from the nature of the case, it can not be properly pleaded, but applies properly to the exclusion of testimony, that the testimony which the party is so estopped from using, should be objected to on that ground; and if not objected to, the objection must be regarded as waived: in the same manner as if incompetent testimony, or an inferior grade, is used when a superior grade is accessible, without objection, the objection is regarded as waived. No estoppel was pleaded in this case, nor any objection made to the testimony adduced. It is, therefore, too late to raise the objection here.

But as the objection may arise upon the return of the cause to the circuit court, on a second trial, we have concluded to settle it now, on principle. We have, therefore, with some difficulty, come to the conclusion that the estoppel can not be made to operate in this case.

Hanson has been made the passive instrument of fraud upon Brown, a creditor, without intention or blame on his part; for it can not be presumed that, when he accepted the donation, he had any knowledge of Brown's debt, or of any intention on the part of Buckner to defraud him. And indeed, there is no ground to believe that Buckner had any such intention at the

time of the gift. Yet the gift is rendered void by operation of law. Hanson has lost his land, and his warranty has been broken, and the proceeds have gone to the payment of Buckner's debt. Hanson has had no agency in producing this state of things. It has been brought about by the default of the defendants, the devisees, and their ancestor, in failing to pay the debt of Brown. Shall they be permitted to rely upon an estoppel to defeat a recovery on their own warranty, broken by their own default? We think they can not. Though they have not themselves "placed the matter at large," they have caused it to be placed at large by their own default, and should no more be permitted to rely upon the estoppel than Brown, the creditor, who did place it at large. And it is well settled, that one is not bound by an estoppel, when his adversary has placed at large the matter of estoppel.

It has been held, that a vendee in possession, whose vendor conveys to another, in violation of his contract, is absolved, and not estopped to deny the title under which he entered, and may purchase and defend under any other claim. So when there is a decree against the vendor for the title, at the suit of another, whether it be for the benefit of the vendee or not: 7 Mon. 104,¹ 659² Why is the vendee discharged from the estoppel? Because of the fault of the vendor.

So in this case, though the vendor has not sold the land, yet his default in paying Brown's debt has caused it to be sold.

Suppose Buckner had made a prior sale of the same land to Brown, and had executed his bond for a conveyance, and afterward had given the land to Hanson, but executed a deed purporting to be for valuable consideration, without notice of the prior sale, and Brown had obtained a decree in chancery, compelling Hanson to convey the land to him, upon the ground that the conveyance was voluntary—could Buckner or his representatives estop Hanson from proving these facts? Surely not. Buckner was first in default, and caused the land to be recovered by his default, and has placed the matter at large, and thereby exonerated Hanson from the estoppel. The case is analogous in principle with the one before the court. The only thing insisted on by Hanson, is, that he be permitted to prove the same matters that were proven by Brown, by way of showing his rightful claim to the property, and which he has been forced to unfold and place at large by the default of Buckner and his representatives. He only asks

1. *Logan v. Steele's Heirs.*

2. *Trot v. Richardson.*

to follow in the wake of Brown, to enter where he has been forced to enter by the defalcation of the warrantor and his devisees. All he claims to prove is, that Buckner was indebted to Brown, when his deed was made, and that his land was taken to pay it by Brown, who had a legal right to show that the deed was voluntary, whether it purported to be so or not, on its face; and that Brown did show it, and that he was thereby evicted from the land.

It is, therefore, considered by the court, that the judgment of the circuit court be reversed, and the cause remanded, that a new trial may be granted.

VOLUNTARY CONVEYANCES, VALIDITY OF.—For an extended consideration of this subject, see the note to *Jenkins v. Clement*, 14 Am. Dec. 698. See also *Anderson v. Green*, 23 Id. 417, and *Whittlesey v. McMahon*, 28 Id. 382, and other cases in the American Decisions cited in the notes thereto.

COVENANTS OF WARRANTY AND BREACHES THEREOF.—See *King v. Kerr's Adm'rs*, 22 Am. Dec. 777, and *Donnell v. Thompson*, 25 Id. 216, and other cases cited in the notes thereto.

ESTOPPELS, HOW TAKEN ADVANTAGE OF.—See *Wood v. Jackson*, 22 Am. Dec. 603, and *Welland Canal Co. v. Hathaway*, 24 Id. 51, and other cases cited in the notes thereto.

UNDERWOOD v. BROCKMAN.

[4 DANA, 309.]

MISTAKE OF LAW AS GROUND OF RELIEF.—When it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and there has been no fair compromise of *bona fide* and doubtful claims, the contract may be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality.

COMPROMISE MAY BE SET ASIDE FOR AN OBVIOUS MISTAKE of plain law, when there was no other motive for it and therefore nothing reasonably or intrinsically doubtful to be compromised; so where the compromise is evidence of fraud, surprise, or imbecility.

COMPROMISE PROCURED FROM A CONFIRMED INVALID, whose mental faculties, through long illness and confinement, may reasonably be supposed to have become weakened, and who has been induced to enter into the compromise solely by threats of legal proceedings, when there was no legal foundation for any claim whatever against him, and such compromise being unreasonable and unjust in its provisions, may be set aside in equity.

APPEAL from the Christian county circuit court. The facts appear from the opinion.

Owsley, for the appellant.

Cates, for the appellees.

By Court, ROBERTSON, C. J. Some time in the year 1810, Elizabeth L., daughter of William Brockman, of Virginia, against her father's advice, intermarried with Charles Bronaugh, a poor and rather prodigal young man, by trade a wheelwright; who, afterward, in the fall of the same year, removed to Kentucky, in company with her unmarried brother, Joshua L. Brockman, to whom her father delivered some slaves, to be kept and controlled, in this state, in trust for her benefit.

Joshua L. Brockman accordingly brought the slaves to Kentucky, and, living with Bronaugh and wife, exercised dominion, according to the trust, until after Bronaugh's death, which occurred in January, 1811.

As Bronaugh owned but little, if any, property, excepting his tools, and a horse and gig, and an interest in a bond made payable to himself, for one thousand dollars, which had been advanced by him to John Rochester, on loan, in the absence of Joshua L. Brockman, and a part, probably the greater part, of which was the money of the said Joshua—his effects were retained and disposed of by his widow and her said brother, without a formal administration.

About two years after Bronaugh's death, William Brockman gave to Joseph Mason, with whom the widow had, in the mean time, intermarried, the slaves he had previously delivered in trust to Joshua L. Brockman.

Ann Eliza Bronaugh—the only issue of the marriage between Charles Bronaugh and Elizabeth L. Brockman, and who was reared and educated by Joshua L. Brockman and her mother and step-father—having intermarried with one William Underwood—he, not long afterward, that is, in the winter of 1832, asserted a claim, in consequence of his marriage, to all the slaves who had been delivered by William Brockman to Joshua L. Brockman, to be brought to Kentucky for his daughter's benefit, and to all the increase of those slaves, and also to the value of the horse and gig and tools, and to the whole sum loaned to Rochester, and legal interest thereon from the date of the bond which Rochester had given, and the amount of which had been collected by Joshua L. Brockman, after the death of Bronaugh.

The facts exhibited in the record show satisfactorily, that Mrs. Underwood had received from Joshua L. Brockman a horse worth as much as that of which her father died possessed; that the gig and tools were not worth, at their utmost value, more than one hundred and fifty dollars; and that a portion of

the money loaned to Rochester, and probably as much as seven hundred dollars thereof, belonged to Joshua L. Brockman, and there is neither proof nor intimation that Charles Bronaugh owned, at the time of his death, any other estate than that which has been just enumerated and described—unless he had title to the slaves, and the proofs leave no reasonable ground to doubt that he never had any vested or legal right to any of them.

According to these deductions, it would appear that, the widow being entitled to one third, the distributive interest of Mrs. Underwood could not have exceeded three hundred dollars, at the time of her father's death. But even if her father owned the whole of the thousand dollars loaned to Rochester, the utmost value of her interest could not have been greater than about seven hundred and sixty dollars—and there can be no doubt that her maintenance until her marriage should extinguish all pretense of claim to interest on her distributive portion.

Nevertheless, Brockman being disabled by a protracted rheumatism, which had confined him generally to his bed for about fifteen years, and moreover being so much alarmed and disturbed with the apprehension of a suit, with which Underwood threatened him, as, in the opinion of many persons, to be *non compos*; and Mrs. Mason—whose last husband was then dead, leaving four infant children by her, and one child by a former wife—being ignorant and fearful of the annoyance and danger of a suit, Underwood succeeded in procuring, what he denominates a compromise, in writing, signed, May 25, 1832, by himself and by Brockman and one Kay, the husband of Mason's daughter by his first wife, and by Mrs. Mason, as guardian of her four infant children by Mason—whereby it was stipulated, that Underwood and wife and Mason's five children should have equal distributive interest in all the slaves, and also in a tract of land which belonged to Mason at the time of his death; and, as the slaves had been previously divided between Mrs. Mason and Mason's five children, it was agreed that she, as guardian for her four infant children, should pay to Underwood, five hundred and sixty-two dollars, and that Kay, for himself and wife, should pay him one hundred and twelve dollars forty and one third cents, in lieu of his conventional sixth part; and it was also agreed that, at the death of Mrs. Mason, Underwood should have one sixth part of the slaves allotted to her for dower, and should also be entitled to a sixth

part of whatever property might, in the mean time, come to her by "gift, descent, or otherwise, from her father or mother;" and the writing also recited, that Underwood and wife had been "greatly induced to enter into this amicable adjustment," by the fact that Brockman had, "by deed of gift," secured to them, at his death, one sixth part of his whole estate.

In addition to the foregoing contract, Joshua L. Brockman, about the same time, gave his note to Underwood for nine hundred and thirty-nine dollars, which he afterward paid to him, and also, on the tenth of May, 1832, conveyed to him a tract of land containing about four hundred acres, and worth between one thousand six hundred and two thousand dollars, for no other consideration than Underwood's claim in right of his wife.

Mrs. Mason having given her obligation for the five hundred and sixty-two dollars, and also for the one hundred and twelve dollars forty and one third cents, and Underwood having obtained judgments on both obligations against her, and also against Joshua L. Brockman as her surety, she and her four infant children filed a bill in chancery against Underwood and wife, and Kay and wife, and against Joshua L. Brockman, for enjoining the judgments, and for rescinding the contract of compromise, for alleged fraud, surprise, and want of consideration.

Brockman made his answer a cross-bill against Underwood, and, on the like grounds, prayed for a cancelment of the deed for the tract of land, for a restitution of the nine hundred and thirty-nine dollars, and for general relief.

Kay, in his answer, concurred in the allegations and prayer of the bill. But Underwood denied the charges of fraud, and insisted that he was justly entitled to all the slaves and to the whole of Rochester's bond and interest thereon, and that, therefore, he had not obtained as much by his contract as he was entitled to; but that, if he was not entitled to the slaves, or to any interest in them, or to more than three hundred dollars of Rochester's bond, still, as the controversy was settled by compromise, without fraud, the chancellor, who favors such adjustments of family disputes, should not disturb the contract of the parties.

The circuit court, however, perpetuated the injunctions to the judgments; rescinded the contract between Underwood and Mrs. Mason and her children, and decreed a reconveyance to Brockman of the tract of land which he had conveyed to Underwood, and a cancelment of the deed of gift for one sixth of his estate. And Underwood, having appealed, now insists that

the decree is altogether erroneous, and should therefore be reversed by this court.

Not doubting that according to uncontroverted facts, Bronaugh had no right to any of the slaves, and that, consequently, Underwood had no interest whatever in them, we are, of course, perfectly satisfied that there was no solid consideration for the agreement made by Mrs. Mason, as guardian for her infant children. Nor can we, therefore, doubt that that agreement was the fruit of fraud, actual or constructive, or of that kind of surprise, or ignorance of fact, or of law, which should entitle the infants to a rescission. For it seems to us self-evident, that a court of equity should not sanction or uphold a compromise by a guardian, so baseless, improvident, and palpably unjust. And therefore, the decree, as to that contract, is approved and affirmed, so far as the infant parties may be concerned.

And, as Mrs. Mason acted chiefly as guardian in the entire arrangement, she should not, under all the circumstances, some of which will be presently considered, be held personally liable; and therefore, as to her also, the decree is approved.

And as to Kay and wife, also, we are of the opinion that the decree should be sustained; because it appears that their acquiescence was merely incidental, or consequential to the agreement made by Mrs. Mason and by Brockman, without any active agency, or voluntary participation, or personal knowledge of either facts or law; and because, also, the agreement is chiefly executory, and should not, therefore, affect Mrs. Kay, who does not appear to have ever given any binding or proper consent.

As to so much of the decree as affects the contracts between Underwood and Brockman alone, and for themselves only, there may be more reason for some doubt. That there may be such a mistake as to a material fact as to entitle a party to exoneration from a contract made under the influence of such a delusion, is not and can not be denied.

But the counsel of Underwood insist that there could have been no such mistake as to any fact respecting his claim against Brockman, as, *per se*, to entitle the latter to a rescission of his agreement; and they also have argued, that no mere mistake as to the law can alone be sufficient for setting aside the contract.

We admit that Brockman should be presumed to have been acquainted with all the facts material to a correct ascertainment of the nature and extent of his liability to Underwood, and that moreover, there was no such relation of trust or con-

fidence between them, nor any such obligation on Underwood to communicate anything he knew, as to authorize the deduction that there was any fraudulent delusion as to material facts. But we are not prepared to concede that no mistake as to any matter of law can ever be sufficient for invalidating a contract. On this point there has been a long and obstinate, and hitherto unsettled, controversy among both practical and elementary jurists, divided generally into two great parties, each endeavoring to maintain an extreme doctrine, the converse of that of the antagonist party, and either of which, to the unqualified extent assumed, is, in our opinion, equally indefensible upon principle or analogy. The doctrine of one party is that, as the efficacy and authority of law depend on the necessary legal presumption that every citizen knows all the laws of his country, therefore no one should in any case be allowed to plead ignorance of the law, or should be entitled to relief from the legal effect of a fair contract, merely in consequence of his actual ignorance or mistake as to the law. The argument of the opposite party is, that the maxim, *ignorantia juris non excusat*, applies only to criminal or penal cases, and between the citizen and his government; and that, as there can be no binding contract unless the minds of the contracting parties were both free and intelligent, therefore ignorance or mistake as to a matter of law should entitle a party to be relieved from a contract superinduced by such ignorance or mistake, in every case in which similar ignorance or mistake as to any fact, would give an equitable title to relief.

This same diversity existed to a great extent among the civilians; and as to the right to repetition, in a case in which money had been paid under a mistake as to the legal liability of the payor, we find Cujas and Heineccius in the negative, and Vinnius, Domat, D'Aguesseau, and Pothier in the affirmative.

Common law jurists have, in the like manner, taken opposite sides of similar questions. In *Harman v. Camm*, 4 Vin. Abr., and in several other cases adjudged in England, it was said, that ignorance of law would not avail in a civil any more than in a criminal case. And in *Shotwell v. Murray*, 1 Johns. Ch. 516, and *Lyon v. Richmond*, 2 Id. 51, Chancellor Kent recognized the same doctrine.

But in *Lansdowne v. Lansdowne*, Mose. 364, and *Simpson v. Vaughan*, 2 Atk. 33, as well as in some other British cases, the opposite doctrine was asserted. And this court, in *Fitzgerald*

v. *Peck*,¹ and in many other cases, has given relief on the sole ground of a mistake or ignorance as to the law. The court of appeals of Virginia has taken the same course: See *Price's Ex'r v. Fuqua's Adm'r*, 4 Muntf. 68.

Even Chancellor Kent, notwithstanding the unqualified opinion which he expressed in the cases reported in 1 and 2 Johns. *supra*, said, in the subsequent case of *Storrs v. Barker*, 6 Id. 169 [10 Am. Dec. 316], "it is rarely that a mistake in point of law, with a full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practiced upon mankind," etc.; "it would therefore seem to be a wise principle of policy, that ignorance of the law, with a knowledge of the facts, can not generally be set up as a defense."

In *Hunt v. Rousmanier*, 8 Wheat. 214, and 5 Conn. 401, the supreme court of the United States, after expressing a similar opinion as to the general rule of policy, qualified it by admitting, that it was not universal, and that there may be cases in which mere ignorance of law alone would entitle a party to relief in a civil matter, on the ground, as suggested, of the presumption of imbecility, or of fraud, which might arise; and the court might have added also, the additional and more conclusive and plain ground of a want of consideration.

And should there be any doubt—can there, upon principle, or even policy, be any doubt, that if, without any other consideration, good or valuable, moral or legal, than an erroneous opinion that he is legally bound, A. shall have paid, or assumed to pay, B. money, he would, in conscience, and in judgment of law, be entitled to restitution or exoneration? If he had paid, upon what principle of law or ethics could B. claim the right to hold? or if he had only agreed to pay, why should the law compel payment? Ignorance of law, of either the civil or the moral code, should not excuse a rational being from the prescribed responsibility for a voluntary violation of it; because, so far as civil and moral conduct may be concerned, it is the duty of every intelligent citizen and moral agent to know the law and his own obligations, and no government, moral or political, could prevail or be upheld, if a plea of voluntary ignorance would excuse an infraction of its prescribed rules of conduct. Universal anarchy and licentiousness would be the natural consequence of allowing such a defense to be sufficient to entitle the offender to impunity.

But the same reasoning does not apply to contracts, or to private rights. It is well known, that all persons do not understand some of the plainest rules of law, and that no person, however enlightened, knows all the law. And if one, ignorant of a plain principle of law, shall, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, what principle of law, or dictate of justice or policy, would require him to be bound, as with a Gordian knot, which nothing but the sword could loose?

Why should he be punished in such a case, for such ignorance? or why should the other party be enriched or benefited, without any equivalent or merit of any kind or to any extent whatsoever? A mistake of fact might be sufficient to entitle to relief or exoneration, because such a mistake would show, that the contract was not such as the parties, or at least one of them, contemplated or would have made, had there been no mistake. Might not a mistake as to the law, in a parallel case, be equally availing, and for precisely the same reason? Undoubtedly it might, and as we think, should: and such we understand to be the rational and consistent doctrine of the common law established in Kentucky.

But, as it is generally difficult to prove satisfactorily, that a party was ignorant of the law, or that such ignorance was the only consideration which actuated him, it is, of course, not so easy, and, therefore, has not been so common, to obtain relief on the ground of a mistake as to the law, as on that of ignorance or mistake respecting a material fact. And even when it may be evident that there was a mistake as to the law, yet if the question of law were doubtful, and the parties, differing in respect to what was the true rule, had, in consideration of its uncertainty, and in consequence of their diverse opinions respecting it, made a fair compromise of conflicting and honest claims, their contract should stand; because the doubtfulness of the legal right, and the desire to avoid the expense and uncertainty of litigation, would be a valuable, meritorious, and all-sufficient consideration to give it legal and effectual obligation. And were this not so, no compromise of doubtful rights would ever stand; because, in every such case, the one party or the other, must have been mistaken as to the law, or the facts, or both.

But when it can be made perfectly evident, that the only consideration of a contract was a mistake as to the legal rights or

obligations of the parties, and when there has been no fair compromise of *bona fide* and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality.

In this case, as between Brockman and Underwood, it is obvious, that there must have been surprise, incompetency, fraud, or ignorance, as to the law; for as Underwood only claimed of him the thousand dollars with interest, and the value of the gig and the tools; and there seems to have been no pretense for claiming more; and as it is evident that, after deducting the widow's third part, and even not more than the legal rate of interest on the residue, for the maintenance of Underwood's wife, not more than about seven hundred and sixty-six dollars would remain due—there can be no doubt, that if Brockman had sufficient capacity, and there was neither fraud nor surprise, he must have been induced to make the contract by an apprehension that, as there had been no regular administration, he was legally liable for the whole estate and interest upon it, and even also for damages for a violation of law. He alleges in his cross-bill, that Underwood took that ground, and alarmed, and, from time to time, annoyed him with threats of a suit which would expose and perhaps ruin him; and that allegation has not been directly or sufficiently denied. And here, without going further, might be found a ground sufficient for rescinding the contract, in part at least: for, considering the situation of the parties, the facts of the case, and the nature of the contract, the cross-bill and the answer to it furnish, in the particular just noticed, sufficient evidence of fraud, arising by implication from the facts and from the conduct of Underwood.

But the facts being, as they must have been, well understood by both parties, there was, beyond the amount of the bond given by Brockman, according to the utmost rational calculation, not one cent due to Underwood, and there was no semblance of reason for claiming more, if indeed there was any for claiming even that much. To any greater extent, therefore, there was nothing doubtful which could form the basis of a binding compromise; and consequently, the claim to any greater extent should be deemed to have been fraudulently fabricated, and the alleged compromise, so far as it included the four hundred acres of land, should not be permitted to operate as an obstacle to the relief decreed.

Lord Eldon has taken the ground, that a compromise may be

set aside for an obvious mistake of plain law, when, of course, there was no other motive for it, and consequently, nothing reasonably or intrinsically doubtful to be compromised. And many other judges have followed him.

Whether, therefore, the compromise is evidence of fraud, or surprise, or imbecility, or whether there was an evident mistake of plain law, and was therefore nothing fit for a compromise, is not material; for it seems clear to us, that some one or all of these several hypotheses should be admitted to be true; and if any one of them be so, the decree for a reconveyance of the land was not unjust or erroneous.

But in addition to the foregoing considerations, we can not forbear to notice the helpless condition of Brockman, and the fact that some of his intimate acquaintances and neighbors were of the opinion that, in consequence of confinement and disease, and the conduct of Underwood, he was incompetent to make the compromise. This alone, when combined with the unreasonableness of the contract, should be deemed altogether sufficient for determining its invalidity.

Wherefore, it is the opinion of this court, that the circuit judge did not err in decreeing a reconveyance. The nine hundred and thirty-nine dollars, which Underwood received and has been permitted to keep, is surely as much as he had a semblance of just reason to expect or demand.

But we are constrained to disapprove so much of the decree as canceled the "deed of gift:" first, because it does not appear that that deed had any connection with the compromise; and, second, because it was neither exhibited in the case, mentioned in the cross-bill, nor embraced, even constructively, in the prayer for relief. As it was not, therefore, a subject of litigation, the circuit court had no jurisdiction over it, and consequently, no power to make any decree respecting it.

Much that has been suggested in this opinion about the compromise with Brockman, would, were it deemed necessary to make the application, apply as fitly and effectually to the contract made by the guardian; the decree respecting which has been sustained on a ground peculiar to that branch of the case, without relying, to the full extent of their just effect, on all the considerations which might, with propriety, have been brought to bear upon it, as effectually as some of the like circumstances and deductions have been applied to the contract between Brockman and Underwood.

Wherefore, it is decreed and ordered, that so much of the

decree as perpetuated the injunctions to the judgments at law, and rescinded the contract between Mrs. Mason and Underwood and others, and directed a reconveyance from Underwood to Brockman, of the tract of four hundred acres of land, be, and the same is hereby affirmed. But it is also decreed and ordered, that so much of the decree as canceled "the deed of gift," as it has been called; be, and the same is hereby reversed.

And it is finally ordered, that the appellant, Underwood, pay to the appellees their costs in this court, on the original bill; but as between him and Brockman, on the cross-bill, as that presents a case within the discretion of this court, and there has been a partial reversal and a partial affirmance of the decree of the court below, there will be no order respecting costs here.

MISTAKE OR IGNORANCE OF LAW AS GROUND OF RELIEF FROM A CONTRACT: See the notes to *Storrs v. Barker*, 10 Am. Dec. 323, and *Lawrence v. Beaubien*, 23 Id. 164. See also *Fisher v. May*, 5 Id. 626, and *Drew v. Clarke*, Id. 698.

COMPROMISE OF DOUBTFUL RIGHT, VALIDITY OF: See *Hoge v. Hoge*, 2^d Am. Dec. 52. and cases cited in the note thereto.

MOORE'S HEIRS v. MOORE'S DEVISEES AND EX'RS.

[4 DANA, 354.]

PERPETUITY, WHAT IS NOT.—A devise of money to be kept at interest, and the interest to be applied to a particular charitable purpose, does not create a perpetuity repugnant to the common law.

MORTMAIN ACTS OF ENGLAND were never recognized as the law of Kentucky and Virginia.

DEVISES TO CORPORATIONS ARE NOT FORBIDDEN by the Kentucky statute of wills.

COURT OF EQUITY MAY ENFORCE A TRUST INDEPENDENTLY OF THE STATUTE of 43 Eliz. if it is defined by the donor so as to enable the court to ascertain and apply it according to legal rules.

BEQUEST FOR CHARITABLE PURPOSE.—Where a testator empowers his executors to sell his estate and directs a certain portion of it to be converted into a fund "for educating some poor orphans" of a particular county, "to be selected by the county court, who are the guardians of such, and to be confined to such as are not able to educate themselves," such fund to be loaned out at interest and rendered "a perpetual fund" and the interest only so applied, the trust thereby created is sufficiently certain for judicial recognition and enforcement, independently of the statute of 43 Eliz.

IF THERE IS NOT SUFFICIENT CERTAINTY AS TO THE BENEFICIARIES in such a case to enable a court of equity to enforce the execution of the power, AM. DEC. VOL. XXIX—27

the court will at least not interpose, on the application of the heirs to prevent its execution.

STATUTE OF 43 ELIZ. IS IN FORCE IN KENTUCKY so far as it operates to give validity to charitable gifts not otherwise valid, and cures such bequest for the education of the poor orphans of a county, if it should be deemed defective by the common law.

OBJECTS OF THE STATUTE OF 43 ELIZ. discussed.

COURT OF EQUITY HAS JURISDICTION UNDER THAT STATUTE to enforce the trust created by a bequest for the education of the poor orphans of a particular county, made valid by the statute, and if not, it would not interfere against the beneficiaries.

APPEAL from the Harrison county circuit court. The opinion states the case.

Owsley and John Trimble, for the appellants.

Morehead and Brown, for the appellees.

By Court, ROBERTSON, C. J. Henry C. Moore, who died in Harrison county, in this state, in 1832, by his last will, regularly proved and admitted to record in the same year and county, empowered his executors to sell any or all of his estate for the benefit of his wife and only surviving child, Thomas W. Moore, then an infant; directed that his said son should have two thirds of his estate whenever he should attain twenty-one years of age, and his wife the other third for life, remainder to his son; and then made the following provision: "In case my son Thomas should depart this life before he arrives at age, then the estate devised to him I desire may be converted into a fund for educating some poor orphans for this county (Harrison), to be selected by the county court, who are the guardians of such, and to be confined to such as are not able to educate themselves—that it may do as much good in that way as it can, I desire the funds shall be taken and loaned out at interest, so as to be rendered a perpetual fund, and the interest only to be applied to their tuition—thereby affording a partial good to as many orphans as the scanty pittance will allow."

The appellants, as heirs and distributees of Thomas W. Moore—who, while an infant, died in a short time after the demise of the testator—claiming the estate devised to him, because, as they alleged, the legal title, in the event of his death under twenty-one years of age, descended to them, because, as they argued, the contingent devise to the use of the poor orphans of Harrison county was void for want of certainty—filed a bill in chancery, in 1834, against the county

court of Harrison and against the executors of the will of Henry C. Moore, for establishing and enforcing their claim.

The relief sought by the bill was resisted by the answers, on the ground that the devise for the benefit of the poor orphans of Harrison is neither uncertain, nor, on any other account, void, but is good, and may be available.

The circuit court having dismissed the bill, this appeal seeks the reversal of that decree, and the appellants insist here, as in the court below, that the devise for the use of the poor orphans is void, and that, therefore, they themselves, as heirs and distributees, are entitled to the whole estate thus undisposed of by the will.

The case, as thus presented, involves questions both delicate and difficult, hitherto undecided, and but little considered by this court, and which, therefore, are felt to be peculiarly interesting and important.

Although the demise has not been written with proper skill or suitable precision or care, yet the object and general intention of the testator can not be seriously doubted. It is sufficiently clear that he intended, in the event of his son's death under twenty-one years of age, that his executors should convert the estate devised to that son into money; and it seems to us but reasonable and consistent to infer, that the fund, when thus fixed, should be deposited with the county court of Harrison, in trust for the education of such poor orphans of that county as should be ascertained to be unable to educate themselves, and as should be designated as fit beneficiaries, from time to time, by the justices of said court, who should keep the principal on loan and apply the interest to the purposes of the trust. No other depository of the fund having been designated, we feel authorized to infer, that the testator intended that the court charged with the distribution of the proceeds, and with the selection and superintendence of the recipients, should have the possession of the fund and the legal right to control it. And consequently, we deem the county court a legatee of the whole trust fund.

Thus considering the devise—the first question to be considered, is whether it is either illegal or void, without any aid from the statute of charitable uses, of the 43 Elizabeth.

As land is not locked up, but the only fund secured is money, which is, by the direction of the testator and according to the nature and objects of the trust, to be kept in active and con-

stant circulation—the common law repugnance to perpetuities can have no application.

Nor do any of the British mortmain acts affect the case: first, because they are chiefly, if not altogether, local in their policy and operation, and were therefore never recognized as the law of Virginia or Kentucky; and second, because none of them enacted prior to 1776, embraced such a devise as that which we are now considering; unless the British statute of wills should be deemed, in one respect, a mortmain act, and if so much of it as prohibited devises to corporate bodies should be so considered, still it can have no effect, because our statute of wills contains no such inhibition or exception; and besides, if the county court of Harrison could not take the money, yet it would be competent to execute the power of appointment, and then the only question would be whether there is an available trust created by the will, which a court of equity might protect and execute. Hence it seems to us, that there is nothing illegal in the devise.

And we are strongly inclined to the opinion that the devise is not void for uncertainty, if tested by the doctrines of the common law alone, and might be enforced by a court of equity, under its general jurisdiction over trusts, and the execution of powers connected with beneficial interests. Such a jurisdiction, upon original bill, whether the trust was deemed a charity or not, had been established in the time of Lord Ellesmere, at least five years prior to the enactment of the statute of 43 Elizabeth: *Philadelphia Baptist Association v. Smith and Robertson*, 3 Pet. 481; *Orphan Asylum Society v. McCartee*, 9 Cow. (N.Y.) 437;¹ *Wilman v. Lex*, 17 Serg. & R. 88 [17 Am. Dec. 644]; *Attorney-general v. Mayor of Dublin*, by Lord Redesdale, 1 Bligh (N. S.) 347; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Attorney-general v. Utica Insurance Co.*, 2 Johns. Ch. 389; *Baptist Association v. Hart's Ex'rs*, 4 Cond. R. 383; 4 Wheat. 1.

These cases, and many others which might be superadded, show that, independently of the statute of 43 Elizabeth, a court of equity might enforce a trust, whenever it was defined by the donor, or was so described by him as to enable the court, consistently with the rules of law, to ascertain and apply it to the objects intended.

In the case of *Inglis v. The Trustees of the Sailor's Snug Harbor*, 8 Pet. 112, the supreme court sustained, upon common law principles, a devise to the chancellor of New York and to

1. *McCartee v. Orphan Asylum Soc.*, 18 Am. Dec. 516.

the mayor and recorder, etc., of the city of New York, of estate in trust for building a marine hospital for the support of infirm sailors, to be called "The Sailor's Snug Harbor," to be under the superintendence and visitorial control of the trustees and their successors, with a request that they should be incorporated by an act of the legislature, if they could not take and act in a corporate capacity without such a legislative enactment. The legislature of New York having, about a year after the testator's death, incorporated the persons named as trustees, and the object of the trust, that is, infirm seamen, to be selected by the trustees, being deemed sufficiently certain for judicial action, the court decided that the devise to persons afterward to be incorporated was good as an executory devise; and that the will so far specified the objects of the trust as to make it the duty of the trustees to act, as directed, for the benefit of certain persons who might, according to the will, manifest their beneficial interests, and claim the aid and protection of a court of equity; and that, therefore, the devise was not, even according to the common law, void for want of capacity in the trustees to take, or for uncertainty as to the *cestuis que trust*, or the nature, extent, and object of the testator's bounty. And, in that case, the court said, as had been before said, in 2 Ves. jun. 835:¹ "Wherever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created; unless he shows clearly that his desire expressed is to be controlled by the trustee, and that he shall have an option to defeat it." And the court might, upon well-established principles of equity, have added that, when such a trust is created, a court of equity will support and enforce it, even if the donor had appointed no trustee, and had let the legal title go to his heirs; for it is well settled, that where there is a beneficial trust, a court of equity will act as trustee, or appoint one if necessary, for effectuating the objects of the grantor.

Now, it seems to us, that the executors in this case are trustees, to "sell and convey" the estate and convert it into money; and that the county court of Harrison is a trustee of the fund when converted into money, with full power to control and appropriate it, not according to its arbitrary discretion, but according to the declared intention of the testator, for the education of such poor orphans of Harrison county as may be unable to educate themselves. And it seems to us, that the testator's in-

1. *Maitin v. Kelghley*.

tentions and the objects of his bounty are sufficiently certain for judicial recognition and enforcement. And moreover, we are of the opinion that, even if the legal title should be considered undevised, powers are given to the executors and to the county court, and beneficial interests, dependent on the execution of those powers, are vested in a designated class of persons, which a court of equity may aid and protect, according to the doctrines of the common law.

And we are also of the opinion that, if there is not sufficient certainty, as to the beneficiaries, to enable a court of equity to enforce the execution of the power, nevertheless, the executors and the county court may execute the powers confided to them, and a court of equity should not interpose to prevent it, on the application of the heirs: *Porter's case*, 1 Co. 22. This is altogether unlike a devise to persons incapable of taking, or to persons not sufficiently identified, and without any trust, or the intervention of a trustee, or of a power. Even a naked power may be voluntarily executed; and a power coupled with a trust or beneficial interest may be enforced by a court of equity, when the nature and objects of the trust are certain, or may be rendered certain. The devise, then, in this case, not being void, in consequence of vagueness, the appellants appear to have had no right to claim the interposition of a court of equity, for preventing the execution of a power not void or repugnant to law.

But, if we are mistaken in the foregoing conclusions, we do not doubt that the application of the statute of 43 Elizabeth, would cure any defect in the devise, as tested by the common law, and make it valid and available; and we are of the opinion that that statute is in force here to a sufficient extent at least for all the purposes of this case.

According to the civil law, gifts by devise or otherwise, to charitable uses, were peculiarly favored, and were sustained *cy pres*, even though the object was general and undefined, or the donee uncertain or incapable of taking, so that, if there had been no charity, the gift would have been illegal or void.

In England, the king, as *parens patriæ*, had the prerogative right of visitation and of consequential curation, control, and appropriation of charities, when there was no charter or writing devolving the visitorial right on another, or reserving it to the donor. And this regal prerogative, with some other curative powers inherent in the crown, was delegated to the chancellor

of England, in his ordinary ministerial capacity, as the keeper of the great seal and official organ of the king.

The extent of the power of the king, or of his representative, the chancellor, over charities, it would be difficult, perhaps impossible, to ascertain with satisfactory certainty. Antiquarian research has left the subject in some doubt and obscurity; and an investigation of it now would be more curious than useful.

It seems clear, however, that prior to the 43 Elizabeth, though the chancellor had assumed, to some extent, equitable jurisdiction in cases of charity, it was not on account of the charity, but only because there was a trust, which, being valid according to the common law, might be protected and enforced by a court of equity. The chancellor, in his extraordinary character as a judge in equity, had no peculiar jurisdiction over charities, and the more probable and prevalent juridical deduction is, that the chancellor when, prior to the 43 Elizabeth, he exercised equitable power over charities, did not do so according to the doctrines of the civil law, peculiar to charities, but only according to the principles of the common law, adopted from the civil code, respecting trusts; and, of course, he could not enforce a charitable trust, if, according to the doctrines of the common law, it was either illegal or void for indefiniteness or vague generality; nor could he apply the charity to any other purpose than that designated by the donor.

The better opinion seems, also, to be, that neither the crown, nor the chancellor under his delegated authority, ought to enforce or appropriate a charitable legacy or gift which was not valid. It is not admitted here, that prerogative could, according to the common law, in that class of cases more than in all others, violate the private legal rights of those who, by operation of law, were entitled to that which had been illegally or abortively dedicated to charity. See the reasoning of Chief Justice Marshall, in the *Baptist Association v. Hart's Ex'rs*, *supra*.

It seems to be understood that, two objects were contemplated in enacting the statute of 43 Elizabeth: 1. To apply some of the doctrines of the civil law to certain charitable donations enumerated in the statute, and thus to render such gifts valid, in many instances, although they would have been void had there been no charity, and even with the charity, according to the common law; 2. To afford a summary and effectual remedy by commissioners to be appointed by the chancellor as the executive representative of the crown.

It seems to be understood, also, that since the enactment of

that statute, nothing has been deemed a charity which is not embraced within its constructive import; and that since that time, jurisdiction in equity has been assumed and maintained over cases provided for by the statute: *Attorney-general v. Newman*, 1 Lev. 284; *West v. Knight*, 1 Ch. Cas. 134; Fonbl. (Am. ed.) 493; 3 Pet. 488, 489.

This statute has been construed in England as repealing, as to the cases within its scope, the mortmain acts; as making valid and availing charitable donations which would have been ineffectual at common law, in consequence of vagueness as to the object or the beneficiary, and also, as authorizing the appropriation *cy pres* of a charity to some suitable and congenial purpose of charity, not inconsistent with the general intent of the donor, and when no specific application has been directed by him, or that which had been designated failed or was illegal.

The statute embraces devises to the use of poor orphans, and therefore applies to this case, if it be in force here. The only remaining question, therefore, is whether it is in force, and to what extent.

The first object of the statute being general and beneficent, and not local or peculiar to the policy of England, when the Virginia colony was first planted at Jamestown, under the auspices of Smith, in 1607, we should presume that so much of the statute as was applicable was imported and recognized as a part of the laws of the mother country, claimed by the colonists is their provincial settlement. As the statute was in force at and before 1606 (the date of the Virginia charter), there was no necessity for re-enacting it in the colony, as there would have been, had it been enacted in England since 4 James I., the year of the charter. Nor have we ascertained, or made much effort to ascertain, whether, and if at all, how far it may have been re-enacted by the colonial legislature; because, for the general reason already suggested, we presume that it was considered as in force, to the extent of its first and principal object, without any express recognition of it by the local legislature.

As to the remedy it prescribed—and which, as already shown, was, to a great extent, only cumulative or alternative—we infer that it was never deemed to be in force in Virginia, because there being no such officer there as the lord chancellor in his representative character, so far it was inapplicable.

But if, to the extent suggested, the statute was not imported

by the colony, we should be of the opinion that, as it seems to that extent, to have been general and applicable to the colony, as well as to the mother country, it was adopted by the ordinance of 1776, in which Virginia declared, in substance, that the common law of England and all statutes or acts of parliament in aid of the common law prior to the fourth year of James I., and which were of a general nature, and not local to England, should be considered as in full force in that commonwealth, until modified or repealed. And this idea is corroborated by the fact that, the supreme court of the United States said, in 3 Pet. 486, that the statute of 43 Elizabeth was repealed in Virginia in 1792. We have not examined whether it was expressly repealed; but if, as elsewhere said, it was only constructively repealed, it must, of course, have been at least constructively in force before its repeal.

That repeal having been since the first of June, 1792, when Kentucky became a separate state, and she having, by her constitution, adopted the common law and general statutes in force in Virginia at the time of the separation, we are brought to the conclusion, that the statute of 43 Elizabeth, to the extent of its first and general object, as to the validity of charitable gifts, is a portion of the law of this state. We are therefore disposed to adhere to, and reiterate the same opinion announced in general terms, in the case of *Gass and Bonta v. The Shakers*, 2 Dana, 177.¹

It is argued, however, that the jurisdiction of the chancellor of England over charities, since the 43 Elizabeth, has been altogether personal and delegated, and was never exercised by him in his judicial character, as a judge in equity.

Were this conceded, the consequence would be unavailing to the appellants; because, if, by the operation of the statute, the devise is valid, a court of equity should not interfere against the *cestuis que trust*, and prevent their enjoying its benefits, as far as they may, under the power given by the will. But, as already stated, we are of the opinion, that a court of equity had, and has, some jurisdiction under the statute, and that jurisdiction would, as we think, apply availably to this case, were the interposition of a court of equity necessary for enforcing the trust, or preventing a maladministration of it.

Prior to the enactment of the statute, the king was the visitor of all eleemosynary corporations, when no other was appointed regularly or legally, and had also, as before stated, the

prerogative, in the nature of the right of visitation, of superintending charities in many, if not in all cases, in which that right was not otherwise secured. This power had been delegated to the chancellor as the agent of the crown; and after the 43 Elizabeth, however it might have been before, implied a plenary discretion, according to the doctrines of the civil law, restrained only by the terms of the charter, or the expressed will of the donor. And chiefly by the application of those doctrines, the statute received a construction singularly latitudinarian, and the power of the chancellor was greatly extended, so as to embrace:

1. Cases in which a general purpose of charity is manifested, without a designation of its objects, or of the mode of administration;
2. When a definite object of charity is specified, or a particular mode of applying it is provided, and the prescribed object or mode shall have failed or become impracticable; and,
3. When the fund is more than adequate to the specified purpose.

In all these classes of cases, the chancellor, by the application of the civil law doctrine of *cy pres*, will not only support the charitable intention, but will apply it by analogy to some kindred or proximate object of charity, as the following adjudged cases will show: *Moggridge v. Thackwell*, 7 Ves. 75-86; *Attorney-general v. Matthews*, 2 Lev. 167; *Attorney-general v. Siderfin*, 1 Vern. 224; *Clifford v. Francis*, Free. C. C. 330; *Paice v. The Archbishop of Canterbury*, 14 Ves. 372; *De Costa v. De Pas*, Amb. 228; *Attorney-general v. Baxter*, 1 Vern. 248; *Attorney-general v. Clarke*, Amb. 422; *White v. White*, 7 Ves. 423; *Powell v. Attorney-general*, 3 Meriv. 48; *Attorney-general v. Hickman*, 2 Eq. Cas. Abr. 193; *Baylis v. Attorney-general*, 2 Atk. 239; *Attorney-general v. Herrick*, Amb. 712; *Attorney-general v. Gleg*, 1 Atk. 356; *Cook v. Duckenfield*, 2 Id. 562; *Attorney-general v. City of London*, 3 Bro. C. C. 171; *Attorney-general v. Bishop of Oxford*, 1 Id. 444; *Hereford v. Adams*, 7 Ves. 324; *Attorney-general v. Earl of Winchelsea*, 3 Bro. C. C. 373.

In *Moggridge v. Thackwell*, *ubi supra*, Lord Eldon recognizes the three classes of cases which the foregoing citations sustain, and we will not swell this opinion by an unnecessary repetition of the substance of each reported case, but will only state the general conclusions which they have concurred in establishing; and that is: 1. That when the charity is not given to trustees, and no particular object is designated, nor any person appointed to select the object, the king, as *parens patriæ*, appoints the object, under his sign manual, and the chancellor, as keeper of the great seal, directs the application, by the

attorney-general, to the crown, to make the appointment. In this class of cases the chancellor does not act judicially as a court of equity. 2. When the donor refers to a future selection of the object by himself, and dies without making any selection, or when trustees, appointed for that purpose, die without acting, or when the fund is superfluous, the chancellor, not only will support the charity, but will apply it according to a scheme to be submitted to the master in chancery. 3. When an ascertainable object is designated by the donor, in general or collective terms, as the poor of a given county or parish, or when a person is appointed by him to select a described portion, or kind, or number from a designated class, the chancellor, sitting as judge in equity, will interpose on the ground of trust.

In the two first classes, unless the donor manifest an intention to restrict his bounty to some general object of charity embraced by the statute, the legacy or gift will be void, and neither the king nor the chancellor can make any application of it. In the third class, if there be an available trust according to the common law, it is not material whether there be a charity within the statute; but if there be no trust that would be good at common law, and the object of the bounty be collective, and consequently indefinite and incapable of taking without the aid of the statute—as, for example, a described class of unincorporated persons, as the mechanics of a particular place, the members of a specified church, or the poor of a designated town, or parish, or county—then unless the selected object be such as the statute recognizes as charity, the common law, and not the statute, applies, and the legacy or gift will, of course, be deemed void; but if the object be a charity according to the statute, the gift or legacy will be deemed valid, and may be upheld or enforced by a court of equity, as an implied trust, made good and effectual by the operation of the statute.

Now, as we have no such officer here as the chancellor of England, and as our courts of chancery have no other jurisdiction than that of courts of equity, and no other power than that which is judicial or regulated by law, it is evident that they have no cognizance of any case embraced in the first of the foregoing classifications. And we do not admit that the commonwealth, as *parens patriæ*, can rightfully interfere unless there be an escheat to her; and then she may become absolute and beneficial owner. Rights here are regulated by law, and if any person have a claim to property ineffectually dedicated

to charity, the commonwealth has no prerogative right to decide on that claim, and dispose of the property, as the king of England has been permitted to do: See *Attorney-general v. United Insurance Company*, 2 Johns. Ch. 386, 387. In *The King v. The Master and Fellows of St. Catherine's Hall, Cambridge*, 4 T. R. 233, the court of king's bench decided, that it had no jurisdiction, because the right of visitation belonged to the king, whose discretion was not controlled by law; and therefore, the court acting not according to discretion, but law, could take no cognizance.

The prerogative cases in England are not judicial. And we should doubt whether a court of equity in this country would have any jurisdiction over any of the second class of the last enumerated cases.

We are satisfied that the *cy pres* doctrine of England is not, or should not be, a judicial doctrine, except in one kind of case; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such a case, a court of equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor. But it does not act judicially when it applies his bounty to a specific object of charity, selected by itself, merely because he had dedicated it to charity generally, or to a specified purpose which can not be effectuated; for the court can not know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar benevolence, has seen fit to decree its appropriation, whereby he, and not the donor, in effect and at last, creates the charity.

But it is not necessary, or even fitting, that we should now decide or discuss all the various and perplexing questions arising under the statute of the 43 Elizabeth. It is sufficient that we decide, as we shall decide, and have already intimated, that this case is of that class over which a court of equity may take cognizance; and in which such a court, acting judicially, may act effectually, in upholding and promoting the bounty of the testator, according to his declared and unambiguous intention,

and without violating any rule of law, principle of justice, or dictate of public policy.

If it be an available trust, there can be no doubt of the jurisdiction of a court of equity without regard to the statute; and if the statute apply, we can scarcely doubt that a court of equity might take effectual cognizance, even in England. And in this latter opinion we are sustained, as we think, not only by some of the foregoing authorities and considerations, but by the case of the *Attorney-general v. Wansay*, 15 Ves. 231, and *Waldo v. Kaley*, 16 Id. 206, and by the opinion of Justice Story, in the case of *Philadelphia Baptist Association v. Smith and Robertson*, 3 Pet. 499, where he says, when speaking on an analogous question: "My opinion is that it belongs to the court, as a court of equity, exercising jurisdiction to enforce a trust recognized and enforced by the law of the land; and I think this opinion is corroborated by the better authorities."

And we too think that, not only reason and analogy, but a series of cases adjudged in England, will tend to the same conclusion.

In the *Attorney-general v. Clarke*, Amb. 422, George Cranston having given, by his will, four thousand two hundred pounds bank annuities to the poor inhabitants of St. Leonards, Shore-ditch, which would have been void at common law, the question was, whether the legacy was a charity within the statute, and therefore valid. Sir Thomas Clark, master of the rolls, decreed that it was; and this seems to have been a decree in equity. And in *White v. White*, 7 Ves. 423, a testatrix having bequeathed three thousand pounds for putting out "poor relations" apprentices, and afterward having, by a codicil, restricted the legacy to two families of her relations, Sir William Grant, master of the rolls, decreed that it was a charity, protected and made valid by the statute. And this was evidently a suit in equity by original bill.

Other cases of a like kind might be added; but we forbear. Whenever the only objection to a devise or legacy is, that it is for the benefit of a class of private individuals, described collectively by some characteristic trait by which they may be identified, if the donation be a charity within the statute, and is therefore valid, it is, as a matter of course, as good and available as it would have been at common law, had it been to a competent person, in trust for another similar person, identified in the will by his proper name; and consequently, whoever may hold the legal title—if it did not pass by the will—will hold

it in trust for the collective body to whose use it was dedicated by the testator. This seems to be an undeniable proposition; and if it be so, what objection can there be to the jurisdiction of a court of equity over it, as over any other valid and enforceable trust? Its being a charity according to the constructive operation of the statute, can not be material except for the purpose of determining whether it is valid, as it will be if a statutory charity; or void, as it must be according to the common law, and the only law of the case, if it be not such a charity. If it be valid under the statute, then it will be just as available, and just as judicially determinable, as it would have been had it been a good trust according to the principles of the common law. And if a court of equity might take cognizance of it in the one case, because it is a trust, is there, can there be, any reason for a want of jurisdiction in equity in the other case, when the same trust exists with equal effect? We think not. The case is not prerogative, but judicial and equitable; and if a court of equity here has no jurisdiction, what court has? None. Then, as, according to the letter of the statute, and the tenor of the cases we have cited, the devise in this case must be deemed such a charity within the statute, as a court of equity might protect, we conclude that, on this ground, were there no other, the bill of the appellants was properly dismissed.

But also, for reasons suggested in the first part of this opinion, we are, as already stated, satisfied that, even if the devise is not protected, as a statutory charity, the bill was properly dismissed.

Wherefore, it is decreed and ordered that the decree of the circuit court be, and the same is hereby affirmed.

CHARITABLE BEQUESTS, VALIDITY OF: See the note to *Daskill v. Attorney-general*, 9 Am. Dec. 577. See also *Methodist Church v. Remington*, 26 Id. 61; *Going v. Emery*, Id. 645, and other cases in the American Decisions cited in the notes thereto. See also *Sanderson v. White*, *post*. In *Jackson v. Phillips*, 14 Allen, 576, 584, 590, the principal case is referred to as an authority in discussing the jurisdiction of courts of equity, to enforce charitable trusts.

STATUTE OF 43 ELIZABETH, IN WHAT STATES IN FORCE: See *Methodist Church v. Remington*, 26 Am. Dec. 61; *Going v. Emery*, Id. 645, and cases referred to in the notes thereto, and *Sanderson v. White*, *post*.

RUNYON v. BENNETT.

[4 DANA, 598.]

SUPERSEDEAS HAS NO RETROACTIVE EFFECT so as to deprive the judgment of its force and authority, but only suspends its subsequent efficacy. Hence, where a *habere facias* is issued and executed after a certificate of *supersedeas*, but before such certificate is filed in the court where the judgment is, and before notice thereof to the officer or party, such execution is valid, and it is error to quash the writ and return, and award restitution.

MOTION. Appeal from the Madison county circuit court. The opinion states the case.

Turner, for the appellants.

Breck, for the appellee.

By Court, MARSHALL, J. A *supersedeas* suspends the efficacy of a judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, so as to deprive the judgment of its force and authority from the beginning, but only suspends them after, and while it is itself effectual. A consequence of this is, that whatever is done under the judgment, after and while it is superseded, being done without authority from the judgment, which is then powerless, and against the authority and mandate of the *supersedeas*, should be set aside as improperly and irregularly done; but that whatever is done according to the judgment, before the *supersedeas* takes effect, is upheld by the authority of the judgment, and is not overreached by the *supersedeas*. But the question is, when does the *supersedeas* take effect so as to suspend the force and authority of the judgment, and render all further proceedings upon it irregular?

It seems to us, that the judgment of one tribunal can not be deprived of its force, or in any manner affected, by the order of another, until there be some evidence of the order among the records of that tribunal in which the judgment itself remains, or some notice of it given to the officers concerned in executing the judgment, or at least to the parties to be benefited by it. It would be unreasonable to suppose that, either the court which renders the judgment, or its officers, or the party claiming under it, are bound to take notice of the *ex parte* order for a *supersedeas* at the moment when it is granted. The law has determined otherwise. It has furnished the party obtaining a

supersedeas with the means of making it known where it should be known, and has prescribed the mode of doing it. And we are of the opinion, that it has no effect upon the judgment, or upon the regularity of the proceedings under it, until the proper evidence of its existence has been furnished.

In this case, the writ of *habere facias* upon the judgment in ejectment had been fully executed before the certificate of *supersedeas* from the clerk of this court had been filed with the clerk in whose office the judgment remained of record, and before the summons from this court had been delivered to the sheriff who executed the writ of *habere facias*, and when, as was admitted, the plaintiffs in the writ had no notice of the *supersedeas*. And the circuit court, on motion of Bennett, the defendant in the writ, quashed the writ and return of execution thereon, and gave judgment of restitution in favor of Bennett, on the sole ground that the writ had issued after the date of the certificate of *supersedeas* above mentioned.

But as, according to the view which we have taken, there was no irregularity, or abuse of the power or process of the court in issuing and executing the writ of *habere facias* at any time before proper notice of the *supersedeas*, it follows, that there was no sufficient ground in the facts as stated above, for quashing the writ and return, and awarding restitution, and the court erred in so doing.

Wherefore, the judgment of restitution, and the order quashing the writ of *habere facias* and the return thereon, are reversed, set aside, and annulled, and the case is remanded.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

MILLAUDON v. WESTERN MARINE AND FIRE INS. CO.

[9 LOUISIANA, 27.]

THE VALUATION OF PROPERTY IN A POLICY is binding upon the insurers in the absence of fraud.

AN OWNER'S INSURABLE INTEREST REMAINS UNCHANGED, notwithstanding other insurance effected on the property to its value.

THE RECOVERY BY AN OWNER WHERE SEVERAL INSURANCES EXIST on his property to more than its value, is restricted to the value of such property.

INSURERS OF SEVERAL POLICIES ON THE SAME PROPERTY, are sureties between themselves, and therefore any one or more who have paid the entire amount of a loss may recover from the others a proportionate contribution to the loss.

A CLAUSE IN AN OPEN POLICY OF INSURANCE, restricting the liability thereon in case of subsequent insurances on the property to a ratable proportion of any loss that may occur, will not apply in the case of a subsequent valued policy expressed as intended to cover that part of the property left uncovered by the prior open policy.

THE VALUE OF PROPERTY COVERED BY AN OPEN POLICY of fire insurance must be proved in case of loss.

THE case appears from the opinion.

Slidell, for the plaintiff.

Maybin, *contra*.

By Court, **BULLARD, J.** This is an action upon a policy of insurance against fire, subscribed by the defendants upon five tenements, three thousand dollars on each. The total loss by fire, is admitted within the time limited by the policy, and it is admitted that the value of the property greatly exceeds the

amount underwritten by the defendants. The case would, therefore, be perfectly free of difficulty, independently of a second policy obtained by the plaintiff from another company for a further sum of fifteen thousand dollars, of which due notice was given to the defendants, and the second policy indorsed on the first. The defense in this case turns upon the question how far the obligations of the first insurers have been modified or changed by the second policy, according to a just interpretation of the sixth condition of the insurance, which declares that "persons insuring property at this office, must give notice of any other insurance made elsewhere on their behalf on the same, and cause such other insurance to be indorsed on their policies, in which case each office shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained, and unless such notice is given, the insured shall not be entitled to recover in case of loss."

The second insurance, by the New Orleans Insurance Company, was on the same property or tenements, "valued at six thousand dollars each, making in all thirty thousand dollars, of which fifteen thousand dollars are insured in the Western Marine and Fire Insurance Company: this policy covers the other fifteen thousand dollars."

This last is clearly a valued policy, and according to the general principle of the law of insurance, in case of total loss such valuation would be binding on the insurers, unless fraud be shown.

It can not be said that the valuation by the second policy became by notice to the first insurers binding on them, and converted their policy from an open to a valued one. If so, there is an end of the case; for the loss being total, and the valuation conclusive, as to the indemnity to be paid, each office would have to sustain one half of the loss, estimated at thirty thousand dollars. The second policy clearly can not put the first insurers in *duriori casu*, and it follows, that even in case of total loss, the first insurers would be liable only to make good the loss, if that loss really amounted to the sum subscribed by them.

The second insurers admit, by their policy, that there remained an interest in the assured, not covered by the first policy, amounting to fifteen thousand dollars. This interest is covered by them. It appears to be a settled principle, that if the subsequent policy contain no provision in respect to prior insurances, the amount of insurable interest for such policy

will be the same as for the first, for the assured may insure again and again the same property, against the same risks, if he will pay the premium; but he can recover but one indemnity, and this he may recover of the first or subsequent underwriters, and those who pay the loss may demand a proportionable contribution from the other insurers. The different underwriters are, by this means, sureties for each other: 1 Ph. 326.

The same author says expressly, that in case of insurance on merchandise, furniture, or buildings, against fire, the rules as to valuation, are the same as in relation to a ship or cargo; if the policy is open in its form, the value of the interest must be proved: 1 Ph. 320.

If the defendants will not adopt the second insurance as to valuation, we can not well see how they can take advantage of it for the purpose of exonerating themselves from a part of the loss for which they are clearly liable under their own policy. It appears to us, that the sixth condition applies to subsequent insurances, by which the same interest is covered as by the first, or to cases of several successive open policies on the same property, and to guard against double insurances. The same author, above cited, lays down the doctrine, under the authority of decided cases, that the amount of interest to which a subsequent policy applies, will depend on the amount insured in the previous policies; a cargo valued in a prior policy at twelve thousand dollars, the amount insured, was valued in a second policy at twenty-seven thousand five hundred dollars. Though the whole cargo was insured in the first policy, yet there remained an insurable interest of fifteen thousand five hundred dollars for the second. Since, as the property was valued in the second policy, this excess remained over the amount previously insured: 1 Ph. 327.

We are, therefore, of opinion, that the defense here set up can not avail the defendants, and that they are liable to pay the full amount underwritten by them.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed, with costs.

LIABILITY OF SUCCESSIVE INSURERS.—This subject is treated of at length in the note to *Alliance Ass. Co. v. Louisiana State Ins. Co.*, 28 Am. Dec. 121-125, where the principal case is amongst others relied on.

WILCOX v. STEAMBOAT PHILADELPHIA.

[9 LOUISIANA, 80.]

THE MASTER AND OWNERS OF A STEAMBOAT are not liable for the theft of a package of money brought on board by a passenger and retained by him within his personal custody, no compensation for the carriage of the package being paid.

THE CLERK OF A STEAMBOAT has not authority, by receiving from a passenger a package of money brought on board by the latter, for safe keeping, to bind the master and owners. The contract in such case is merely one between clerk and passenger.

THE case appears from the opinion.

Conrad, for the plaintiffs.

Preston, *contra*.

By Court, MARTIN, J. This is an action against the master and owners of the steamboat Philadelphia, to recover from them the sum of three thousand eight hundred dollars, for this amount of bank notes, which were sent in a sealed packet by a passenger on board, and stolen or lost, while the boat was on her passage down the Mississippi river. The plaintiffs are appellants in this court from a judgment rendered in the district court, rejecting their claim. The facts of the case, as shown by the evidence, are briefly these: The steamboat Philadelphia, while on her way down the river, stopped at Vicksburg, where one of the passengers received from the agents of the plaintiffs a sealed packet, in which was alleged to be inclosed sundry bank notes, amounting to the sum claimed, and which was to be delivered to the plaintiffs on his arrival in New Orleans. This letter or packet was delivered by the passenger to the clerk of the steamboat, for safe keeping, who locked it up in an iron chest. The key was accidentally mislaid, or stolen from his pocket while he was asleep, and the letter or package stolen.

The question presented in this case, appears to us to be simply one of deposit for safe keeping, between the passenger and clerk. This is a kind of contract, which, it clearly appears, the clerk had no authority to make on behalf of the owners or master; a contract in which the depository does not insure the safety, or become liable for the thing deposited. He promises nothing but ordinary care and diligence.

This was not the contract of a common carrier for hire, to deliver goods at a given place; for the letter or packet was to

be returned to the passenger or depositor, at any time he called for it, during or at the termination of the voyage.

Neither can the defendants be considered as liable for a part of the passenger's baggage, when separated from the rest. It is impossible to admit that the owners or master of a steamboat are liable for the contents of a letter, or sealed package, which may be delivered to a cabin or steerage passenger, at any place the boat may stop on its way, to take in wood, freight, or merchandise, or land or receive passengers. The owner of such a letter incurs no obligation to pay anything for the transportation of it; neither does he enable the master of the boat to exercise any control or care over it. He can not, therefore, and neither can the boat or owners, be responsible for its safe keeping.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

LIABILITY OF PASSENGER CARRIERS for packages of money belonging to their passengers: *Bean v. Sturtevant*, 28 Am. Dec. 389.

BAUMGARD v. MAYOR.

[9 LOUISIANA, 119.]

A SEIZURE UNDER A MUNICIPAL ORDINANCE BECOMES A TRESPASS AB INITIO, if there has been a failure to comply with the subsequent proceedings prescribed by the ordinance.

A MUNICIPAL CORPORATION IS LIABLE FOR THE SEIZURE BY ITS OFFICERS of property, in pursuance of its ordinances, when such seizure has been vitiated by subsequent conduct of the officers.

THE case appears from the opinion.

McMillen, for the plaintiff.

Eustis, *contra*.

By Court, *MATHEWS, J.* This is an action in which the plaintiff seeks to recover from the corporation, a carriage called an omnibus, and a pair of horses, or their value, in consequence, as he alleges, of an illegal seizure and detention of this property, by an officer acting for the body politic.

The answer to the complaint contains a general denial and justification. Judgment was rendered for the defendants in the court below, and the plaintiff appealed.

The seizure was made under an ordinance of the city, relating to all kinds of carriages used to carry passengers or freight for

hire, and was perhaps lawful in its commencement; but the steps taken in pursuance of the seizure, are alleged to have been illegal and without authority, the effect of which has been arbitrarily to deprive the plaintiff of his property, without any legal or just cause.

The ordinance relied on, in justification of the proceeding adopted by the corporation, was passed on the thirtieth October, 1824, and the property seized comes clearly within the purview of the first article. The fourth article directs explicitly the disposition which must be made of property seized and stopped under its authority. It is made the duty of the officer seizing, to carry the things seized before a competent tribunal, to be sent to a place of deposit designated by the mayor; notice is required to be given of these proceedings, and if no claim be put in on the part of the proprietor within fifteen days, the magistrate is authorized to cause the objects thus arrested to be sold, and appropriate the proceeds to the payment of any fine which may be imposed, free of license and taxes, and if there be any surplus it is to be placed in the treasury of the city, subject to the order of the proprietor. It does not appear that any of these measures were pursued in the present instance, and as the provisions of the ordinance are restrictive of the free use of property by owners, to justify such a short-handed mode of redressing the violation of the law, all the means calculated to relieve a proprietor ought to be shown to have been fully complied with. It is, however, urged in argument as an excuse for not having acted strictly in conformity with the requisites of the ordinance, that the plaintiff was so prompt in endeavoring to recover his property by immediately commencing suit, that the defendants had not time to pursue the regular course pointed out to them. We are unable to assent to the force of this argument, because the law made it the duty of the officer who seized to carry the property directly before a competent tribunal; and besides it would have been very easy for the defendants in answer to the plaintiff's action to have insisted on proper redress for the violation of the ordinance, as a condition on which the property should be restored to the owner. Having failed in the performance of all these things, the act of their officer may well be considered as a trespass *ab initio*, for which his constituents are responsible.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be avoided, reversed, and annulled.

And it is further ordered, adjudged, and decreed, that the defendants and appellees do deliver to the plaintiff and appellant the carriage and horses which were seized and arrested by their officer; or in default thereof that they pay to him the sum of eight hundred dollars; and it is moreover ordered, that this cause be remanded to the court below to cause the damage which the plaintiff has suffered (if any he has suffered by the misconduct of the defendants) to be assessed, they to pay the costs in both courts which have already accrued.

ABUSE OF PROCESS RENDERS TRESPASSER LIABLE AB INITIO, WHEN: See note to *Barrett v. White*, 14 Am. Dec. 365, note. The principal case appears in conflict to the general rule laid down, p. 366, that a seizure by an officer, originally legal, can not be afterwards constituted a trespass *ab initio*, by mere acts of non-feasance.

MUNICIPAL CORPORATIONS ARE LIABLE for all illegal and malicious acts done through their agents to the injury of an individual or of his property: *Goodloe v. City of Cincinnati*, 22 Am. Dec. 764.

CURELL v. MISSISSIPPI MARINE AND FIRE INS. CO.

[9 LOUISIANA, 163.]

MISREPRESENTATION AS TO THE DATE OF SAILING of a vessel, made to insurers at the time of obtaining insurance thereon, is a material misrepresentation that will invalidate the policy, if it be of a character to have caused the vessel to have appeared much less out of time than she in reality was.

A MISREPRESENTATION OF A MATERIAL FACT will invalidate an insurance policy, whether it was made with the intention of deceiving or merely through error.

A STATEMENT AS TO THE TIME OF SAILING OF A VESSEL is a representation, and not a warranty.

ACTION on a policy of insurance, taken out to cover the amount of commissions to which plaintiffs would be entitled on goods shipped to their consignment by the Edward Downs, from Belfast to New Orleans. The policy was obtained on the fourth of January, 1831. Representations at the time were made to the insurer that the vessel had certainly not sailed before the eighteenth of October previous. The vessel was seen off the coast of Jamaica December 1. On the third of the same month she was lost.

Eustis and G. B. Duncan, for the plaintiffs.

Lockett, contra.

By Court, MATHEWS, J. This case was before the supreme court in February term, 1832, and was remanded to the district court for a new trial, in consequence of a belief that the verdict of the jury, on which the judgment had been based, was not supported by the evidence. The cause, on the new trial, was finally submitted, to the decision of the court, without the intervention of a jury, and judgment being rendered for the defendants, the plaintiffs appealed.

A correct decision of the case depends mainly on one fact, viz., whether there was concealment or misrepresentation on the part of the insured, relative to the time at which the vessel sailed from the port *a quo*; the plaintiffs having insured the amount of commissions to which they would be entitled on goods shipped to their consignment, by the ship Edward Downs, from Belfast, in Ireland, to New Orleans. All the important facts disclosed by the testimony, are detailed in the opinion heretofore pronounced by this court: See 3 La. 353.

In the evidence then offered, allusion was made to letters which had been received by the plaintiff, Kilshaw, from Belfast, from which it was presumed he had derived knowledge of the true date on which the ship sailed.

These letters were not shown on the first trial of the cause in the court below, but were exhibited on the last. They do not, however, in our opinion, materially vary the state of the case. If they be admitted to have any effect on it, the conclusion or inference to be drawn from them, would be rather prejudicial to the pretensions of the appellants. In obtaining the insurance, the plaintiffs assumed as a fact, and so represented it to the insurers, that the vessel did not sail before the eighteenth of October, 1830. Now, by one of the letters alluded to, dated Belfast, thirteenth October, and received in New Orleans on the twenty-second of December following (about twenty days before the insurance was effected), mention is made of goods similar to those per Edward Downs, as being on hand. The inference from this expression (as we understand it), would be that the ship had sailed before the date of this letter.

The only question in the case is, whether the information or representation given by the insured to the insurers at the time of making the contract, and which is shown by the evidence to have been incorrect, was of a fact material to the risk assumed. We state this as the only question, because, considering the obligation of the insurers complete and binding from the time the terms of insurance were accepted by them (if the contract

be one entered into in good faith and without error) in considering the case, we leave entirely out of view the subsequent occurrences disclosed by the testimony, as to the observations of the president of the company about the time the policy was delivered to the plaintiffs, and after some additional facts relative to the progress of the ship on her voyage, had come to the knowledge of the insurers. These facts can have no influence on the cause, for it was not known at the time of making the contract, that the vessel had been seen near the coast of the island of Jamaica. The insurance must be considered as one from Belfast to New Orleans. The representation made by the plaintiffs at the time when it was obtained, showed the ship to be out from the port *a quo* seventy-two days, when in truth ninety days had elapsed from the period of her sailing, making a misrepresentation or suppression of the space of eighteen days. Whether this misstatement arose from a deliberate intention to deceive, or from error, is not material, the fact being assumed on the part of the applicants for insurance; if it be material in relation to the risk taken, and was afterwards shown to be false, it suffices to avoid the contract.

The testimony shows, that an ordinary voyage from Belfast to New Orleans is performed in about fifty or fifty-five days. But when western winds prevail, the period may be lengthened.

From this it is seen that the ship, in the present instance, was greatly out of time when the insurance was effected. The knowledge, therefore, of the true date at which she left the port *a quo* (as it appears to us), was all-important to those who were about to take on themselves the risk of her safe arrival in the port of destination; and they can not be presumed to have been conusant of this fact, as they were not directly interested in such knowledge previous to the time when the erroneous representation was made to them by the plaintiffs.

It is seen that we have considered the case solely in relation to the doctrine of representations in insurance, and as not coming within any of the rules relating to warranties, and as a proof of the correctness of this mode of treating it, we refer to Condry's *Marshall*, 450 *et seq.*, and *Ph. Ins.* 85, 86.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

MATERIAL FACTS EMBRACE ALL FACTS AND CIRCUMSTANCES that can possibly influence the mind of a prudent and intelligent insurer: *Himley v. South Carolina Ins. Co.*, 12 Am. Dec. 623.

RIORDON v. DAVIS.

[9 LOUISIANA, 239.]

A WITNESS TESTIFYING AS AN EXPERT MAY REFER TO HIS TESTIMONY on a former trial, for the purpose of reviving his recollection of the facts of the case.

A WITNESS TESTIFYING AS TO FACTS WHEREOF HE HAD MADE A MEMORANDUM at the time of their recurrence, may refer thereto for the purpose of refreshing his memory.

THE case appears from the opinion.

Ives, for the plaintiff.

Davis, *in propria persona*.

By Court, BULLARD, J. This suit is brought to recover the value of carpenter's work alleged to have been done for the defendant. He pleaded the general issue and some offsets: and judgment having been rendered against him, for a balance of three hundred and fifty-four dollars, he appealed.

The case appears to have been tried several times, and the record is incumbered with documents, interlocutory orders, and exceptions, which we can not notice, but shall confine ourselves to the proceedings had on the last trial, which was followed by the judgment appealed from.

The correctness of the judgment below, depends mainly on matters of fact, and the evidence in the record abundantly shows that the defendant was indebted, in some amount, for work done as alleged. The quantum depends upon estimates made by carpenters who were examined as witnesses.

The appellant has not favored us with any arguments on points of law, on which he relies for a reversal of the judgment; but there are two bills of exception in the record, which we proceed to notice.

By the first, it appears that while a witness was under examination, the plaintiff's counsel offered him a summary of his testimony, taken on a former trial, for the purpose of refreshing his recollection of what he had testified previously. This was objected to, on the ground that the estimate of the value of work was not matter which could require or justify his reference to a memorandum to refresh his memory. The court having permitted the witness to recur to the summary of evidence, the defendant took a bill of exceptions.

It is now considered a settled rule of evidence, that a witness may refer to a memorandum in order to refresh his memory of facts. The rule, according to the authority of Starkie, does not require that the memorandum should be contemporary with

the facts; it suffices that it was made by the witness, or another with his privity, when the facts were fresh in the recollection of the witness, and that the reading of the memorandum restores the recollection of the fact which had faded in his memory: 1 Stark. 128, 129.

But in this case, the witness was permitted to refer to his former testimony, given when the facts themselves were more fresh in his mind, not directly for the purpose of reviving his faded recollection of the facts themselves, but to remind him of what he had sworn to on a former trial, touching the value of certain work which he had previously examined and appraised. If the witness had died previously to the last trial, his testimony taken on a former trial, would have been admissible. It is clear, also, that when the same witness testifies on a second trial, the adverse party would be authorized to produce his first testimony, with a view of showing that it differed from his statements given on the second trial. Every witness is presumed to have sworn to the truth, until the contrary be shown, and is at liberty to correct his statements during the progress of the trial. We see no impropriety, therefore, in a witness referring to his statements on oath made on a former trial, with a view indirectly of reviving his recollection of facts within his knowledge.

The second bill of exception shows that another witness was permitted to refer to an estimate of the work, made by him and another person, which had been reduced to writing at the time, in order to enable him to refresh his memory. He was permitted to refer to the paper for that purpose, the judge observing that his evidence would be good, if he could afterwards depose from recollection, and not from the memorandum alone. It appears by the record, that the witness had been appointed one of two experts to examine and value the work done, but their report had been set aside. The fact to be proved, was what estimate he had put upon the work done. The report might well, in our opinion, be referred to by the witness as a memorandum deliberately made at the time.

A careful examination of the evidence in the record does not enable us to say that injustice has been done to the defendant.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

WHEN MEMORANDA MAY BE USED for the purpose of refreshing witness' memory: *Nicholson v. Withers*, 13 Am. Dec. 739; *Holladay v. Marsh*, 20 Id. 678; *Union Bank v. Knapp*, 15 Id. 194, note. What can not be used for that purpose: *Pargond v. Guice*, 25 Id. 202.

BALLARD v. MERCHANTS' INSURANCE COMPANY.

[9 LOUISIANA, 268.]

THE RELATION OF CONSIGNOR EXISTS, where goods are shipped to a factor, though his authority over the goods is confined to a reception of them; therefore, where an open policy was taken out by A. on account of whom it might concern, and embracing all property consigned to him, property forwarded him was covered thereby, though the shipment was through inadvertence, and was followed by orders to deliver over the property as soon as received.

A CONSIGNOR MAY SUE IN HIS OWN NAME UPON THE OPEN POLICY OF HIS CONSIGNEE, taken out for benefit of whom it may concern, and embracing the property consigned.

A CONSIGNEE, WHOSE OPEN POLICY COVERS PROPERTY OF HIS CONSIGNOR, is agent of the latter with reference to the insurance, and authorized to receive payment of the amount due his principal on the policy.

A CONSIGNEE CAN NOT BAR HIS CONSIGNOR'S RIGHT OF ACTION on such policy, by acts short of receiving payment of the amount due, or of canceling the policy; therefore, the fact that the consignee failed to enter on such open policy the name of his consignor, will not discharge the insurer.

ACTION on a policy of insurance. The policy was open on account of whom it might concern, and extended to all property consigned to Linton in New Orleans. The other facts appear from the opinion.

Worthington and Eustis, for the plaintiff.

Slidell, contra.

By Court, **BULLARD, J.** This is an action to recover of the defendants, as underwriters, the value of seven bales of cotton, belonging to the plaintiff, which he avers were shipped by his agent, at Alexandria, on Red river, to John Linton, and were covered by an open policy of insurance, procured by Linton, for whom it might concern, of the defendants. The loss by perils of the river is not contested. In the policy it is declared, that this insurance is on cotton in bales, etc., shipped, or to be shipped, to the consignment of John Linton.

The defense consists, 1. Of a denial that the plaintiff's cotton was covered by the policy; and 2. An allegation that if the policy ever attached, all claim for the loss alleged to have been sustained by the plaintiff, has been waived and abandoned by John Linton, in whose name the policy was made; that property to the amount for which said policy was effected, has long since been declared to the defendants, by said Linton, as covered by the policy; that they have paid large sums of money for losses

accruing under the policy to Linton, who has settled and liquidated all claims resulting from it.

The first question thus presented by the pleadings is, whether the cotton alleged to have been lost, was contemplated by the contract, and covered by the policy, or in other words, was it shipped to the consignment of John Linton?

The bill of lading shows that the captain of the steamboat Paul Clifford took on board seven bales of cotton, shipped by James Norment, which he engages to deliver to John Linton, or his assigns, and the plaintiff, in his petition, alleges that Norment was his agent. This appears to the court, on the face of it, to be a consignment. It authorized Linton, on paying the freight, to receive the cotton, and he would have a lien on the cotton for advance of freight and other charges. Admitting that Linton had no authority to sell, or make any other disposition of the property, we do not consider it of the essence of a consignment that the consignee should have such authority. It is enough if he had a right to receive it, and of that the bill of lading is sufficient evidence.

If the bill of lading had been accompanied by a letter, instructing Linton, on receiving the cotton, to deliver it over to another person, or to store it, or to forward it to another market, it would nevertheless have been a consignment. The letter from Norment to Linton, requesting him to turn over the cotton to another house, is not inconsistent with the original consignment. It is true, Norment may have been in error in supposing that Linton was the general factor of the plaintiff, and consequently wrote to him, not revoking the consignment, but directing in what manner he was to dispose of the cotton. Norment, who made the shipment in the absence, and without any positive orders from the owner, testifies that he would not have shipped the cotton, if he had not thought it would be protected by Linton's policy; and that, on discovering that he was not the commission merchant of Ballard, he wrote to Reynolds, Byrne & Co. to receive the cotton from Linton, supposing they would refund the freight and charges of insurance. The error consisted, therefore, not in the consignment, but in supposing that Linton was already authorized by the owner to sell his cotton. Norment's letter and the bill of lading arrived at or about the same time, and not until after the cotton had been lost. We are of opinion that the policy attached in favor of the plaintiff as soon as the shipment was made, as evidenced by the bill of lading.

The only remaining question is, whether Linton was shown to have done any act by which the defendants have been released from their obligation to Ballard. It appears that he presented the bill of lading of the plaintiff's cotton to the president of the insurance company, but with an intimation that probably it was intended for Reynolds, Byrne & Co. Upon this suggestion, the president struck the name of the plaintiff out of the statement handed for settlement. Other lots of cotton, lost at the same time, and shipped in the same bill of lading, were paid for, and the policy was filled by Linton without reference to these seven bales. Mr. Thompson testifies, at the same time, that Mr. Linton did not intend to abandon any rights which he might have acquired under the policy. It is not pretended that, at the time those seven bales were lost, the policy had been filled by other property to the value which the defendants engaged to cover, nor that losses have been paid to the full amount insured. Ballard having a right to sue, in his own name, under a policy procured by Linton, for account of whom it may concern, Linton must be considered in relation to him as an agent. If he had canceled the policy, he would have rendered himself liable for the loss, and the payment of the loss to him would have been a good and valid discharge. It does not appear that the policy was canceled, and, even as relates to Linton himself, it is by no means clear that he would not still have a right to maintain an action on it.

In the case of *Russell v. Bangley*, Chief Justice Abbott said: "The general rule of law is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving the money, writes off money due from him to the debtor, then the latter is not discharged. In cases of insurance, usage may possibly introduce a different rule, but, at all events, an underwriter has never been considered as discharged as against the assured, until his name has been stricken off the policy:" 2 Ph. Ins. 367; 4 Barn & Ald. 395. Upon the whole we think the plaintiff entitled to recover the value of the seven bales of cotton, deducting the amount of premium at one half per centum; but, as the value is not shown by any evidence in the record, the case must be remanded.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be reversed and annulled, at the cost of the appellees, and it is further ordered that the case be remanded for a new trial.

Cited to the effect that the open policy of a consignee, intended to cover consignments to himself, will cover consignments made through error: *Lambeth v. Western Mar. and F. Ins. Co.*, 11 Rob. (La.) 85.

ACTION UPON POLICY FOR BENEFIT OF "WHOM IT MAY CONCERN" may be brought in the name of the party "concerned" as well as in the name of the party mentioned in the policy: *Newson v. Douglass*, 16 Am. Dec. 324, note.

ST. VICTOR v. DAUBERT.

[9 LOUISIANA, 814.]

AN AGREEMENT WITH A CLERK, THAT HE SHALL RECEIVE A PROPORTION OF THE PROFITS of a business, as a compensation in addition to a fixed salary, does not constitute him, as between the parties, a partner in the business, and he may therefore be sued at once, for funds of the house in his hands, which he refuses to turn over.

THE case appears from the opinion.

Murphy and Grailhe, for the plaintiff.

Canon, contra.

By Court, MARTIN, J. The plaintiff and another person being partners in trade, established a store and engaged the defendant at a salary of fifty dollars per month to attend to the business of the store and sale of the goods, and further promised him one fourth part of the profits that might be made.

The plaintiff afterwards purchased the interest of his co-partner, and finding the concern unprofitable, shut up the store, after having made a sale of the goods on hand. The defendant was charged with the collection of the debts. After having collected the sum of one thousand seven hundred and seventy-eight dollars, the defendant retained it on the ground that he had a right to do so, until the plaintiff accounted to him and paid over his share of the profits. The present suit was instituted to recover the sum thus remaining in the hands of the defendant.

The plaintiff's demand is resisted, on an allegation that the parties were copartners, and neither of them could sue the other, except for a settlement and recovery of the balance. The parish court dismissed the suit as premature, and the plaintiff appealed.

Whether a participation in the profits of a commercial house creates a liability to the creditors of the concern, and to what extent or amount, is a question which this case does not appear to present.

Between the partners of a commercial house and a clerk who, in addition to his monthly salary, is allowed, as a further stimulus to his industry, a share of the profits, we have no hesitation in deciding, that this allowance does not constitute him a partner. It gives him no additional control over the affairs of the partnership, nor does it authorize him to bind the house or firm further than by the express consent of the partners, or an implied consent resulting from the nature of his employment.

The person thus employed and rewarded, has no right to retain the funds of the house, which employed him to collect them. They must be supposed, until the affairs of the partnership are liquidated, to be provided for, and required to meet its engagements, and afterwards to reimburse the partners for their advances, before a division of the profits is made.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and the cause remanded for new proceedings, the appellee paying the costs of the appeal.

WHEN A RIGHT TO A SHARE IN THE PROFITS will constitute one a partner: *Dob v. Halsey*, 8 Am. Dec. 293, and note 297; when not: *Simpson v. Feltz*, 16 Id. 602.

PEIRCE v. NEW ORLEANS BUILDING CO.

[9 LOUISIANA, 397.]

THE COMPROMISE OF A DOUBTFUL CLAIM is sufficient consideration for a contract.

CORPORATIONS UNDER THE CODE are declared to be intellectual beings, different and distinct from the persons who compose them, with rights and estates beyond the control of the individual corporators.

CONTRACT CAN NOT BE BINDING ON A CORPORATION unless binding on every member thereof.

ACT OF MAJORITY OF CORPORATORS DOES NOT BIND MINORITY, if it has not been expressed in the form pointed out by law.

IDEM.—ACT OF STOCKHOLDERS AT A MEETING, WHEREIN ONLY A MINORITY OF THE STOCK WAS REPRESENTED, is void, and can not be ratified by the subsequent assent of the holders of a majority of the stock, if this assent be given elsewhere than at a meeting of the stockholders.

ACT OF MAJORITY OF STOCKHOLDERS EXPRESSED ELSEWHERE than at a meeting of stockholders, as where the assent of each one is given separately and at different times, is not binding on the corporation.

THE opinion states the case.

Benjamin, for the plaintiffs.

Eustis and Carter, contra.

By Court, *BULLARD, J.* The plaintiffs allege that they or their assignor, purchased certain lots in the city of New Orleans, at a public sale by the defendants; but that difficulties having arisen in relation to the sale, it was agreed that the property should be sold again; that no liability should attach to the first purchasers; that they should relinquish their rights to the property, and that it should be sold again, and the proceeds applied to the payment of the just debts of the company; and that the surplus, if any, should be paid over to those who had purchased at the first sale and relinquished, each purchaser being entitled to the full profit made on his lot, provided the assets of the company should be sufficient to pay all its debts, independent of such profits. They allege that the second sale produced a large profit over and above all the debts of the corporation, and that they have a right to claim the profit made on the resale of their lots respectively, and they pray for judgment against the corporation of five thousand two hundred and fifty dollars, in favor of one of the plaintiffs, and of eight hundred and fifty dollars in favor of the other.

The defendants in this action allege, that the first sale spoken of in the petition was illegal, and made without sufficient authority, and that the agreement stated in the petition was not made in a manner and form to bind the corporation; and if so made, was founded in error and without consideration, and is not obligatory.

Judgment having been rendered in favor of the defendants, the plaintiffs appealed. We have not thought it necessary to inquire, in this case, whether the sale of the ninth and twelfth of December was valid or not. The plaintiffs appear to have renounced all claim under it, and the obligatory force of the contract which they now seek to enforce, does not in our opinion depend upon the question whether they acquired a good title under the first sale. The sole question, therefore, which presents itself for our solution is, whether the contract in question was entered into in such a manner and with such forms as to be obligatory on the corporation. When we say that we need not inquire into the validity of the first sale, we in substance overrule that part of the defense, which sets up a want of consideration for the new contract; because, whether valid and binding, or not, it is certain that the first sale formed the

subject of controversy, and the contract now in question may be regarded as of the nature of a transaction between the parties, by which litigation was avoided.

The question then is, whether there is evidence before us to show that the corporation ever gave its assent to this contract, so as to bind it and every person who composes it, so far as its interests are concerned.

It may be remarked in the first place, that the agreement in question does not purport to have been made by the president and directors of the corporation in the ordinary range of their official duties, and assuming to represent the corporation by virtue of the powers confided to them by the charter. On the contrary, it appears to have emanated from the stockholders themselves. At a meeting of the stockholders, at which a majority does not appear to have been present, either in number of persons or amount of stock, it was resolved that the president and directors be authorized and instructed to cause the property of the company to be sold by the sheriff, under Mr. Millaudon's mortgage, agreeably to the arrangements made by the committee at the City bank, and that the proceeds be appropriated to pay the debts of the company, and that the arrangement made by the committee with the purchasers of the property, at the sales on the ninth and twelfth of December, be confirmed. At the same meeting, it was resolved, that the stockholders who are not represented at this meeting, be called upon to give their assent or dissent to the foregoing resolution, and that a committee of two be appointed for that purpose.

It appears to us quite obvious, that the doings of this meeting, by themselves, did not render the arrangement proposed by the committee, obligatory on the corporation; because, a majority was not present, even supposing the meeting to have been preceded by proper notices to the corporators to attend.

At the next meeting, at which it appears from the minutes there was not a majority present, the committee reported that they had called upon a large majority of the stockholders who had signed in the affirmative; that all the persons who had voted in the negative, except Messrs. Lawson and Rice, had requested their names to be placed on the affirmative list, and that a number of stockholders whom the committee had not been able to see, had expressed a wish to sign in favor of the resolutions. Nothing more was done at this meeting than to receive the report of the committee, who furnished a list of

those who had signed in the affirmative, and of those who had refused their assent, and the adoption of the report by a majority of the stockholders present. These proceedings form the basis of the subsequent transactions, and the inquiry is, whether they furnish evidence of the assent of the corporation to the contract alleged by the plaintiffs.

Corporations are creatures of the law, or as the code expresses it, intellectual beings, different and distinct from all the persons who compose them. They can act only according to their organization, and in the form pointed out by their charters, or the laws of the land. The estates and rights of a corporation (says the code, article 427) belong so completely to the body, that none of the individuals who compose it can dispose of any part of them. A subsequent article (435) declares that in corporations, the act of the majority is considered as the act of the whole.

We assume it as an undoubted corollary, from these principles, that no contract can be binding on a corporation which is not binding on every member of it, on the ground that the assent of the corporation must be given in such a way as to bind the whole. Where the code speaks of the act of the majority being the act of the whole, it must be understood to mean, when applied to such a corporation as this, the will of the majority legally expressed; and if any meaning is to be given to the general principle first declared, that the corporation is distinct from all the persons composing it, it must follow that the will of a majority of corporators, taken separately, is not to be regarded as the will of the corporation itself. We know of only two ways in which such a corporation as the one now under consideration can act, to wit, either through its president and directors, or at a meeting of the stockholders duly convoked. The act by which the defendants were incorporated does little more than give the corporation a name, and a legal capacity. It provides for the appointment of directors, but is silent as to the manner in which the corporators are to be convoked, and how they are to vote, whether *per capita* or according to the amount of shares held by each. In these respects their proceedings and the validity of their acts must be judged of according to the principles of law, applicable to corporations in general. If the two minority meetings be laid out of view as void, the whole rests upon the assent expressed by a majority of the stockholders, not in a meeting of stockholders, but by each one separately and at different times, and evidenced,

not by the minutes of their corporate proceedings, but by a separate paper in the possession of a committee. We can not see in this any legal evidence of the consent of the corporation, either according to its charter or the general principles of law.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

COMPROMISE OF A DOUBTFUL RIGHT, procured without such deceit as would vitiate a contract, concludes the parties, though ignorant of the extent of their rights: *Hoge v. Hoge*, 26 Am. Dec. 52, and note 61, where prior cases in this series are collected.

ACT OF DIRECTORS OF A CORPORATION AT A MEETING IRREGULARLY CALLED, is not binding, unless ratified: *Gordon v. Preston*, 28 Am. Dec. 75; *Stow v. Wise*, 18 Id. 92, and note 102, where the subject is treated of at length.

SAUNE v. TOURNE.

[9 LOUISIANA, 428.]

A VESSEL PROPELLED BY STEAM MUST ALTER HER COURSE to avoid a collision with a sailing vessel, where the latter, at the time that the collision is threatened, has not the use of her sails.

A CUSTOM THAT A STEAM VESSEL ASCENDING HAS A RIGHT TO A CERTAIN SIDE of the river applies as to other vessels of the same class, but not as to sail vessels, and therefore can not excuse a collision with a vessel of the latter description.

ACTION for damages for the loss and injury sustained by a schooner owned by the plaintiff, which was run down by the steamboat Abeona, whereof the defendants were part owners. The present opinion was on rehearing.

Strawbridge, for the plaintiff.

J. Seghers, contra.

By Court, BULLARD, J. In this case a rehearing was allowed, and we have deliberately examined the testimony again, and considered the arguments offered, and proceed to state our reasons for adhering to the judgment first pronounced.

The question presented by the case is, whether the officers of the steamboat Abeona took the proper measures of precaution to avoid the collision. We are satisfied from the evidence that the schooner was not at the time propelled by the wind, and had not the use of her sails, but was floating sideways down stream, making efforts by means of sweeps, and a small skiff ahead, to make the port of New Orleans. It was, therefore,

manifestly impossible for her to change her course so as to avoid a steamboat approaching her path under a head of steam. We repeat, therefore, that it is incumbent on the defendants to show that the steamboat did make use of proper means of precaution to avoid running upon the schooner.

The most obvious means to avoid collision is clearly an alteration of the course or direction of the vessel. In this case it is not pretended that the steamboat changed her course, so as to pass on either side of the schooner, although the schooner was seen at the distance of a mile ahead. The chief pilot left the helm just before the two vessels met. At what moment the wheels of the steamboat were stopped is left uncertain, but we are satisfied from the violence of the shock, and the extent of the damage done, that she must still have been under headway.

The foggy weather called for additional vigilance on the part of the steamboat, which had left port in such kind of weather. The right of steamboats ascending the river to keep along the left bank, according to a pretended usage, can only apply in relation to vessels of the same kind, descending. It would be no excuse for a steamboat to run down a vessel propelled by wind, that the latter was too near shore, and in the usual track of steamboats ascending: *Story on Bail. 386.*

Believing as we do, from the whole evidence in the case, that with proper vigilance and precaution, on the part of the officers of the *Abeona*, the collision might have been avoided, and that no fault can be attributed to the captain of the schooner, it is ordered that the judgment first pronounced remain unchanged.

BOISDERE v. CITIZENS' BANK.

[9 LOUISIANA, 506.]

STOCKHOLDERS UNDER AN ORIGINAL CHARTER can not be ousted of their rights by a subsequent legislative act amending the charter.

THE PRESIDENT AND DIRECTORS OF A BANK CAN NOT ACCEPT AN AMENDED CHARTER, the result whereof would be to deprive stockholders in the institution of their rights as such; as where, after free colored persons had become stockholders under an original charter, a subsequent charter was granted, in which the right of holding stock is confined to free white citizens.

AN ACT SUSCEPTIBLE OF TWO INTERPRETATIONS will be given that which will render it constitutional and valid.

THE WORD "BE" WILL BE CONSTRUED AS MEANING "BECOME" when this is necessary to save an act from the objection of being unconstitutional and void.

THE opinion states the case.

Benjamin and Roselius, for the plaintiffs.

Morphy, *contra*.

By Court, BULLARD, J. The plaintiffs, *f. p. c.*, allege that they were original subscribers and stockholders of the Citizens' bank of Louisiana; that they executed their mortgages, which were duly accepted, in conformity with the charter, and they thereby became entitled to all the advantages, privileges, and immunities conferred by the charter on stockholders; but they complain that the president and directors refuse to consider them as stockholders, or to allow them to act as such, or to dispose of their stock, or to accord to them the privileges to which they are entitled.

The defendants admit all the facts and allegations set forth in the petition, but aver, that when the faith of the state was pledged for the security of the capital of said bank, it was expressly provided, that no person or persons, not being a free white citizen of the United States, and domiciliated in the state, should be directly or indirectly owner of any part of the capital stock of the company, and that no part, sentence, or clause of the act guaranteeing the faith of the state, should go into operation, until the whole should be accepted. They therefore submit the question, whether they can extend to the plaintiffs, who are free persons of color, the rights, privileges, and immunities of stockholders, without a violation of the express conditions under which the faith of the state was granted.

It appears to us clear, that previously to the act of the legislature, amendatory of the charter, and pledging the faith of the state, the plaintiffs had fully complied with all the requirements of law, to constitute them stockholders. They were thereby entitled to all the rights of stockholders; they might sell their stock or pledge it for a loan, according to the provisions of the charter. Their right was fully vested. But it has been argued that until the money was procured, in consequence of the pledge of the faith of the state, the right of the plaintiffs was nominal, and could not be enjoyed, and that the legislature had a right to impose such conditions as it thought proper, and that the condition contained in the last act does not violate a vested right. A right may exist, although its free enjoyment may be suspended or impeded. If the plaintiffs have forfeited or lost their privileges as stockholders, it must be either by their own acts or consent, or by operation of law.

The acceptance of the amended charter by the president and directors can not be considered as producing that effect, because by the charter no authority is given to the board to obtain such a modification as to exclude a part of the original stockholders, and it does not appear that the charter, as amended, has ever been submitted to the stockholders. We are, therefore, of opinion, that the plaintiffs have not, by their consent, lost their privilege.

It only remains to inquire, whether the act of the legislature, amending the charter, and pledging the faith of the state, ought to be so construed as to operate the disfranchisement of the plaintiffs. That act first declares, that in order to facilitate the Citizens' bank in the negotiation of the loan of twelve millions, the faith of the state is pledged for the security of said sum, and it provides for issuing the bonds of the state. The third section declares, that "for the guaranty of the bonds to be emitted by the state, in favor of the Citizens' bank, and of the interest thereof, and for which the state pledges its faith, all the securities granted by the act of incorporation of said bank, and especially by the third and fourth sections of said act, to the holders of its bonds, are hereby transferred to the state, and the holders of the bonds which may be issued in virtue of this act." The securities here spoken of, as provided by the third and fourth sections of the original charter, are the mortgages given by the stockholders; so that the mortgages given by the plaintiffs, among other stockholders, are declared to accrue to the benefit of the state, and of the holders of its bonds, and form in fact a part of the security upon which the loan is to be obtained from foreign capitalists.

The eighth section of the amendatory act, provides for opening books of subscription to complete the capital stock, and a proviso to that section has created the present controversy. That proviso is in the following words, "that no person or persons who are not free white citizens of the United States, and domiciliated in the state of Louisiana, shall be either directly or indirectly owners of any part of the capital stock of said company."

If this clause be susceptible of two interpretations, we consider ourselves bound to give it that which would not involve the destruction of a vested right, the impairing of an obligation, because if such were its clear import, we should be compelled to say that it is unconstitutional and void. That the legislature did not intend to destroy any of the mortgages previously given

by subscribers, is quite clear, because they are declared to accrue to the benefit of the state, and to the holders of its bonds, as a security for the reimbursement of the loan. No exception is made of those mortgages given by persons not white, and not citizens of the United States. It would lead to great inconsistency to suppose that the legislature intended at the same time to annul acts of mortgage, which they accept as a consideration upon which the bonds of the state are issued, and which by the same act, are held out as inducements to capitalists to loan the capital stock. The words of the proviso are prospective and refer to the future. The only doubt arises from using the words "shall be," instead of shall become "*deviendra*," as is employed in the French text. But according to the best lexicographers, the words to be, are sometimes used as synonymous with to become, "to be made to be," and the example given is, "and the twain shall be one flesh," in the old English translation of the bible. Taken in this sense, we may fairly conclude, that the legislature only intended to provide, that hereafter none but free white citizens shall become stockholders, either by subscription, under that section of the act, or by a transfer of existing stock, leaving the rights of all who were at that time stockholders unimpaired. It follows as a necessary consequence, that the president and directors, by a negotiation of the rights of the plaintiffs, would not violate any condition upon which the faith of the state has been pledged; for we can not consider the legislature as having required or imposed a condition constitutionally and legally impossible, that of annihilating the acquired and vested rights of the plaintiffs without their consent.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

HANSE AND HEPP v. NEW ORLEANS MARINE AND FIRE INSURANCE CO.

[10 LOUISIANA, 1.]

THE TRIAL JUDGE IS NOT REQUIRED TO GIVE INSTRUCTIONS irrelevant to the evidence offered.

WAGES AND PROVISIONS OF CREW ARE SUBJECTS OF GENERAL AVERAGE for the period of detention of a vessel at an intermediate port, where necessitated for the repairing of the injuries of the vessel incurred on the voyage, and an insurer of a portion of the vessel is therefore liable for his proportion of such expense.

RECOVERY MAY BE HAD FROM AN INSURER OF HIS PROPORTION of the expenditure for the wages and provisions, in an action upon his policy, although the amount of contribution among the parties had not been previously settled, where the only property to contribute was that an aliquot part whereof was covered by his policy.

ERROR IN VERDICT APPEARING AS A MATTER OF CALCULATION will be corrected and proper verdict ordered entered.

THE opinion states the case.

Lockett, for the plaintiffs.

Strawbridge, *contra*.

By Court, PORTER, J. This action is brought on a policy of insurance, executed by the defendants on the steamboat *Fair Star*, her engine, tackle, etc., for the sum of five thousand dollars, the one fourth of her value. The petition charges the loss of ten thousand dollars, by the bursting of the boilers caused by the winds, waves, and other perils insured against; and alleges that an abandonment was made to the company, who by reason thereof, have become liable to pay the sum of five thousand dollars, with interest and costs.

The petition further alleges that the boat, engine, tackle, and materials, have sustained an average loss and damage to the amount of ten thousand dollars, in consequence of the perils insured against, and it concludes by a prayer for the condemnation of the defendants in the sum of five thousand dollars, with interest and costs, or their proportion of such average loss and damages as the petitioners have sustained.

The general issue was pleaded, and the cause submitted to a jury, who found a verdict in favor of the plaintiffs for the sum of one thousand six hundred and forty-five dollars and forty cents, with interest from judicial demand. This verdict was set aside on application of the defendants, and a new trial granted. The jury who passed on it the second time, gave a verdict in favor of the petitioners for the sum of one thousand five hundred and fifty dollars, with interest. On this finding, the court below rendered judgment for the sum just stated, with interest from judicial demand. The defendants made an unsuccessful attempt to obtain a new trial, and appealed.

There are two bills of exception, which present the questions of law on which the case has been litigated. One is, to a refusal of the court below to charge the jury that the insurers were not liable for losses occasioned by the negligence or mismanagement of the insured or their agents, unless so expressed in the policy.

A great deal of research has been exhibited by the counsel on both sides, in the discussion of this question, but we do not find it necessary to express an opinion on it. The evidence is spread on the record; and we are unable to discover anything in it which authorizes an allegation of this kind, or which could have required the application of the doctrine on which the appellants rely. It would be improper, therefore, to remand the cause to obtain the opinion of the judge *a quo* on an abstract question, not necessary to the decision of the case.

The other bill of exception is in the following words: "At the trial of this cause, the counsel for the defendants moved the court to charge the jury that the wages and provisions paid and consumed during a delay to repair, or after the accident in case she does not repair, were not chargeable to the insurers, under a partial loss on the hull and materials of a vessel; and the court refusing so to charge them, the defendants tendered their bill of exception," etc.

We will first examine the question, whether the insurers are responsible for the wages and provisions of the crew during the time the vessel remains in an intermediate port for repair, and then see whether there was error in the judges not giving the particular charge called for, and if there was, what should be the effect of it.

According to the principles adopted in the English courts, the expenses of the crew for their wages and provisions during the detention of the vessel to refit, are not subjects of general average, and the non-liability of the insurers to reimburse them, seems well established in that country, notwithstanding some doubts expressed by writers on this branch of maritime law.

In one case, which came before the court of king's bench, the reasoning of the chief justice would seem to show the propriety of admitting them as a charge against the insurers, for he is reported to have said: "If the return to port was necessary to the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity, may be considered as the subject of general average." Subsequent decisions, however, have not carried out the doctrine to the extent contended for in this case by the appellees: *Parke Ins.* 174; 2 *Condy's Marshall*, 720; *Hughes Ins.* 290, 292; *Beames*, 166; *Benecke on Indemnity*, 462; *Ab. Sh.* (ed. 1829) 349; 3 *Mau. & Sel.* 482;¹ 4 *Id.* 141;² 2 *Barn. & Cress.* 805.³

In France, such charges were reputed general average if the

1. *Plummer v. Wildman.*

2. *Power v. Whitmore.*

3. *Simonds v. White.*

vessel was hired by the month; but if hired by the voyage, the expense was borne alone by the ship, as a particular average. Valin vehemently contested the justice of such a distinction, and the commission charged with the preparation of the late code of commerce of that country, abolished it by the work which they drew up for legislative adoption. On the representations, however, made by the tribunal of commerce at Havre, it was established, and is now the law of that portion of the continent of Europe: Emergon, vol. 1, 539, 625; Poth., *Traité du Charte Partie*, No. 85; Boulay-Paty, vol. 4, 452, 454.

The law merchant of the United States is contrary to that of England on this point, and does not recognize the distinction of the French jurisprudence. With us it appears well settled that the wages and provisions of the crew, from the time of putting away for the port, and every other expense necessarily incurred during the detention for the benefit of all concerned, are subjects of general average. The reasoning of Justice Sewall, in delivering the opinion of the supreme court of Massachusetts, appears to us to express with clearness and correctness the grounds on which such a rule has been established. "A liberal construction," says he, "in this respect appears conducive to the interest of the insurers in the benefit they derive from every reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging. By rendering all concerned liable in a general contribution to defray the extraordinary expenses of seeking a port, and of the detention there to refit, the hazard of opposing interests is avoided, and a security common to all concerned is purchased, as it ought to be, at their common risk and expense." Ph. Ins., 348; 4 Mass. 548;¹ 7 Id. 365;² 3 Kent Com. 250; 4 Dall. 246;³ 2 Binn. 547;⁴ 2 Wash. C. C. 226;⁵ 2 Conn. 239.⁶

Having thus ascertained the liability of the defendants for the wages and provisions of the crew, during the period the steamboat was detained at Biloxi, our next inquiry is whether the plaintiffs can recover them in the present action. The petitioners demand judgment against them for five thousand dollars, the whole amount insured, or their proportion of such average loss and damage as the plaintiffs might have sustained; which average loss, however, they aver amounts to five thousand dollars. Under these allegations we think the plaintiffs

1. *Paddleford v. Boardman*. 2. *Clark v. United Ins. Co. of Portland*; 8 C., 5 Am. Dec. 80.
 3. *Jones v. Ins. Co. of North America*. 4. *Ins. Co. of North America v. Jones*.
 5. *Ross v. Ship Arctic*. 6. *Starr v. Knox*.

could properly prove a general average. We are not aware what other objection could be made to the action, except that of the amount not being settled by the parties subject to the contribution, before recourse was had on the insurers.

But, although the decisions are somewhat contradictory on this point, we apprehend that the insured may do so, in a case like that before the court, where it is not shown there was anything else to contribute in settling the average, but property for which the defendants are responsible: 7 Johns. 412;¹ Ph. Ins. 353; 4 Binn. 502;² 1 Cai. 196.³

Under this view of the case, we can not see what object, useful to the defendants, could have been obtained by claiming the instructions from the judge *a quo*, that the defendants were not responsible on a partial loss. Admitting they are not, if they were so on a general average, it is immaterial how the judge charged the jury on this point in relation to what his opinion was requested.

There remains for our consideration the amount found by the jury. On questions of fact, we rarely interfere with the decision of the country. If we do so on this occasion, it is because taking every loss proved at the highest rate established by the evidence, the verdict is for too large a sum. The error, therefore, being one of calculation, it behooves us to correct it. Taking the estimate of the engineers at seven thousand dollars, and deducting from it one third of the difference between new materials and old, we have four thousand six hundred and sixty-six dollars. To this must be added the amount of expenses (deducting the charge for attendance on the boat after her arrival in New Orleans, four hundred and twenty-seven dollars and fifty cents, leaves one thousand one hundred and eighty-three dollars and seventy-three cents), which added to four thousand six hundred and sixty-six dollars, gives five thousand eight hundred and forty-nine dollars and seventy-three cents. From this must be deducted one fourth of the value of the old materials, fifty dollars, and we have five thousand six hundred and forty-nine dollars and seventy-three cents, of which the defendants are responsible for one fourth, that is, one thousand four hundred and forty-nine dollars and ninety-six cents; from which two per cent. is to be deducted according to a clause in the policy, and the balance will be one

1. *Jumel v. Mar. Ins. Co.*; 8 C., 5 Am. Dec. 283.

2. *Lapeley v. United States Ins. Co.*

3. *Magrath v. Church*; 8 C., 2 Am. Dec. 173.

thousand four hundred and twenty dollars and ninety-eight cents, for which the plaintiffs are entitled to judgment.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed, and the verdict set aside; and it is further ordered, adjudged, and decreed, that the plaintiffs do recover from the defendants the sum of one thousand four hundred and twenty dollars and ninety-eight cents, with costs in the court of the first instance; those of the appeal to be borne by the appellees.

WAGES AND PROVISIONS OF THE CREW during the detention of a vessel captured and carried in for adjudication, are properly subjects of general average: *Leavenworth v. Delafield*, 2 Am. Dec. 201, and note 207. Where a vessel in consequence of damages was obliged to seek a port of safety to refit, the wages and provisions of the crew were held proper subjects of general average, during the period elapsing from the first deviation to setting out again on the original voyage: *Walden v. Le Roy*, Id. 236. But where a vessel was damaged on the voyage out, and in consequence, on arrival at the port of destination, was obliged to go into dock for repair, but this only after the cargo had been delivered and the freight earned, the wages and provisions of the crew during the period of repair were held not proper subjects of general average: *Dunham v. Commercial Ins. Co.*, 6 Id. 374.

EASTIN v. DUGAT.

[10 LOUIMANA, 186.]

A DEBT SOLD UNDER EXECUTION AGAINST THE CREDITOR IS NOT EXTINGUISHED by its purchase by the debtor through a third person, where a fair price has been prevented at the sale, by representations of the debtor, that he did not really owe the amount.

A DEBTOR IS ENTITLED TO A CREDIT ON HIS DEBT, equal to the amount paid by him, in its attempted purchase, wherever the character of the transaction prevents its being upheld as a purchase.

INJUNCTION suit. The case was before the court in 1832: *Eastin v. Dugat*, 4 La. 397. From the statement of facts there, it appeared that, in a petition filed by Eastin, it was stated, that during the pendency of a suit brought by Dugat against Eastin, a judgment creditor of the former had his claim against Eastin, which was the object of the suit, sold under *fiery facias*, and it was purchased by Mayfield, who sold to Eastin. Afterwards, Eastin not having pleaded the purchase, Dugat recovered judgment against him and sued out execution. On this, Eastin procured an injunction, alleging that the claim of Dugat, on which judgment had been obtained, had been extinguished by confusion, Eastin, who was the debtor, having since the pur-

chase become the creditor of it. Dugat obtained the dissolution of the injunction, and Eastin appealed. The judgment was reversed and the cause remanded. On the new trial the injunction was again ordered dissolved, and damages granted Dugat. The plaintiff appealed.

C. Voorhies, for the plaintiff.

Garland, *contra*.

By Court, BULLARD, J. This case was before the court at a former term on an exception, and was remanded for trial upon the merits: See 4 La. 397.

The answer of the defendant contested the validity of the proceeding had in execution of the judgment of Wartelle & Co. against him, which led to the sale of the debt now in controversy, on various grounds. The opinion we have formed upon another ground of defense set up, renders it unnecessary to examine these alleged informalities in the proceedings. The defendant alleges that the plaintiff interfered in the sale and proceedings which preceded it, and represented the claim of Dugat against him as of no value, and denied its justice, and that in consequence of his conduct, no fair appraisement could be or was made; that it was cried off at a price much below its value, and purchased by one Mayfield, who was acting for the plaintiff himself.

The facts proved on the trial are, that Eastin stated to the appraisers that he owed Dugat nothing, and that the claim, which was for three hundred and fifty dollars, was appraised at one dollar. After the sheriff's sale judgment was rendered against him for that amount, and he then acknowledged that he did owe the money. Eastin furnished Mayfield the money to pay for the claim, and it was sold for sixty-two dollars, and soon after transferred by Mayfield to Eastin. At the sale he took aside a bidder, and upbraided him for bidding for the claim contrary to his interest.

Eastin certainly knew whether he was indebted to the defendant or not, and we are warranted in concluding, from his subsequent acknowledgment, that the amount was justly due; and from his conduct at the sale, that he willfully misrepresented the state of the case to the appraisers, with a view to gain an unfair advantage of the defendant. We are of opinion that he ought not to profit by his own wrong, nor derive any advantage from a sacrifice, which he sought to inflict on his adversary. *Ex turpi causa non oritur actio*.

But in equity the plaintiff is entitled to a credit on the judgment for sixty-two dollars, which was paid by him in discharge of the judgment against Dugat. As this was not demanded in the court below, we can not reverse the judgment on that account, but by consent of parties amend it in that particular.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs, but that the sum of sixty-two dollars be credited on the judgment of *Dugat v. Eastin*, as paid on the twenty-third of November, 1830.

BACA v. RAMOS.

[10 LOUISIANA, 417.]

THE TITLE TO REAL ESTATE BOUGHT WITH PARTNERSHIP FUNDS vests in the separate partners, as joint owners, and any one may sell his undivided share.

A PARTNER SELLING HIS RIGHT IN REAL ESTATE BOUGHT WITH PARTNERSHIP FUNDS is liable to an account to his copartners for the price paid.

A SALE BY A PARTNER TO A COPARTNER, OF HIS INTEREST IN THE PARTNERSHIP, bars him of his right to demand partition of the real estate purchased with the partnership funds.

THE opinion states the case.

Gayoso, for the plaintiff.

Dunbar, contra.

By Court, MARTIN, J. The defendants are appellants from a judgment which decrees the sale of a house and lot (purchased by the parties to this suit, during the existence of a commercial partnership between them), for the purpose of making a partition.

It appears that after the purchase, the partnership was dissolved by agreement, under which the plaintiff received the sum of two hundred and fifty dollars, as the amount of his interest in the partnership concern. The defendants having paid this sum to the plaintiff, retained the possession of all the property of the partnership, and continued in the business of the concern.

The only question which this case presents is, whether the house and lot was part of the partnership property.

The counsel for the plaintiff and appellee, contends that this is joint property, in which he is joint owner, and not partnership property: La. code, 2796; 3 La. 496.

The act of sale by which the premises was acquired, shows that the purchase was made by the parties to this suit as partners, trading under the firm of Joseph Ramos & Co., and a note was given for one half of the price, bearing the signature of the firm. The partners were joint owners, and either of them might have sold his undivided share or interest in the property, which was liable to seizure for his private debts: 3 La. 496. But in case of such sale and seizure, he must have accounted to his partners for the price. Neither could he have occupied any part of the property for his private use, without compensating his copartners. In fact, the title to one undivided third was in him, but the value thereof belonged to the partnership. When the plaintiff withdrew from the partnership, and received a given sum, he relinquished his interest in the value of the house and lot in question to his copartners. He has, therefore, no right to demand a sale for a partition, as immediately after it, the price, being the value of the premises, would instantly become the property of the defendants.

The distinction which we have taken between the title, by which the property is held, and the value thereof, is well known in the other states of the union, where the common law prevails. These rights are there distinguished by the expressions, "legal title," and "equitable title." There, courts of equity enforce the rights of the equitable owner, by compelling the legal one to make a conveyance to the other, precisely as this court did in the case of *Hall v. Sprigg*, 7 Mart. 243 [12 Am. Dec. 506].

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and that ours be for the defendants, with costs in both courts.

Cited in *Thomas v. Scott*, 3 Rob. (La.) 258, to the point that though the legal title of real estate bought with partnership funds, vests in the partners, yet that the equitable title is in the partnership. The case was also cited in *McKee v. Griffin*, 23 La. Ann. 418.

THERE IS AT LAW NO PARTNERSHIP AS TO REALTY, and therefore one partner may, even when land was purchased for the partnership business, convey only his interest therein, regarded as a tenant in common: *Coles v. Coles*, 8 Am. Dec. 231; *Baker v. Wheeler*, 24 Id. 66.

HYDE v. MISSISSIPPI MARINE AND FIRE INS. CO.

(10 LOUISIANA, 542.)

CONDITION IN A POLICY, NOT PRECEDENT, WHEN.—A condition in a policy, that prior damage be repaired, does not postpone the attaching of the policy, as to perils embraced by it, other than those of navigation, where the period of time included in the policy is so short, that to require the making of the repairs as a condition precedent, would postpone the attaching of the policy for such length of time as to make it of little value.

A CONDITION THAT REPAIRS BE MADE TO A VESSEL imposes upon the insured an obligation of making the repairs before again exposing the vessel to the perils of navigation.

THE opinion states the case.

Strawbridge, for the plaintiff.

Lockett, contra.

By Court, MARTIN, J. The petitioners allege that their steamboat, Tom Bowling, was insured in the defendants' office, by two monthly policies. That on their application for the second policy, the boat had sustained considerable damages, for which they had a claim on the defendants, and that afterwards, while she was at the risk of the defendants, under the second policy, she was entirely lost and destroyed, during and in consequence of a storm; wherefore, they claim a compensation as for a total loss.

The defendants pleaded the general issue. There was judgment for the plaintiff for four thousand dollars, and the defendants appealed. The facts alleged in the petition appear to be established.

There can not be any doubt that the defendants are liable for a partial loss, under the first policy. The doubt whether they be so for a partial or total loss on the second arises on a clause in that instrument, in which it is stated, that the insurance is made on condition that the damage which the boat sustained, while she was at the risk of the defendants under the first policy, should be repaired, and the boat put in as good a condition as she was previous to the accident, which occasioned the damage sustained under the first policy; in other words, whether this was a condition precedent, postponing the risk until it was accomplished. We are of opinion it was not.

The risk under the second policy began on the twenty-fifth of June, at twelve o'clock, at noon. The accident under the first policy happened on the twelfth of the same month. As

the second policy was against all risks, happening between the twenty-fifth of June and the twenty-fifth of July, it is clear that it was not the intention of the parties that the obligation which the insured incurred, to send to Little Rock, on the Arkansas river, where the boat lay, and have the repairs completed, should suspend the risk within the time necessary to effect this, which probably must have consumed the better part of the time for which the insurance was made. It can not be believed that the insured would have paid a premium for thirty days, in order to have the boat insured, during a period of less than fifteen days. If the risk had been intended to be postponed until the condition was performed, no premium could have been taken for the time necessary to do so.

The condition imposed on the insured the obligation of repairing the boat before she was exposed to the perils of navigation. In the mean while, any risk resulting *aliunde*, as from fire, was covered by the policy. As but four days expired between that on which the obligation to repair was incurred, and the storm during which she sunk, it is clear that no laches can be imputed to the insured.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed, with costs.

CONWAY v. WILLIAMS' ADMINISTRATOR.

[10 LOUISIANA, 568.]

A GENERAL ACKNOWLEDGMENT OF INDEBTEDNESS, without specifying the nature or extent thereof, in favor of the payee of a note, will not interrupt the running of the time of prescription, as to such note.

THE opinion states the case.

Bradford, for the plaintiff.

Boyle, *contra*.

By Court, BULLARD, J. This is an action by the holder of two promissory notes, against the estate of the maker. The administrator pleads the prescription of five years. Both notes had been due more than five years before suit was brought; and the plea of prescription must prevail, unless it be shown to have been interrupted by an acknowledgment of the debt by the maker.

The evidence on this point is extremely vague. The witness who testifies to a loose conversation between himself and Will-

iams, the maker, out of the presence of the plaintiff, does not pretend that any particular debt or amount was spoken of, but merely that Williams said he was indebted to the plaintiff. We are of opinion, that the acknowledgment of a debt, in order to interrupt prescription, must be specific, an acknowledgment of the debt: La. code, 3486, 3516, 3517, 3518; 3 La. 362.

The plea of prescription was properly sustained. It is therefore ordered that the judgment of the court of probates be affirmed, with costs.

INDEFINITE ACKNOWLEDGMENTS OF INDEBTEDNESS.—The doctrine of the principal case is one that has very generally commended itself to the courts of this country. Its reasonableness is easily perceived, for were a general admission of indebtedness to remove the bar of the statute as to one demand, then would it also do so as to all others; and so an unguarded expression could be tortured into an admission far distant from the real intention of the party. Accordingly, ever since the courts have ceased to consider the statute of limitations as one of maleficent purpose, to be overthrown upon the most flimsy of pretexts, such general admissions have been considered by most courts as not being *per se* sufficient to remove the bar of the statute: *Martin v. Roach*, 6 Ga. 21; *Burr v. Burr*, 26 Pa. St. 285; *Arey v. Stephenson*, 11 Ired. 86; *Clarke v. Dutcher*, 9 Cow. 674; *Conway v. Reyburn*, 22 Ark. 290; *Clarke v. Maguire*, 35 Pa. St. 259; *Sherrod v. Burnett*, 8 Ired. 310; *Lockhart v. Eaves*, Dudley (S. C.) 321; *Robbins v. Farley*, 2 Strobr. 348; all of which cases hold that an acknowledgment to take a demand from the operation of the statute of limitations, should be clear and explicit in relation to the subject or demand to which it refers.

A strong instance of the application of the principle is to be found in *Moore v. Bank of Columbia*, 6 Pet. 92. In that case a conversation had been overheard between defendant and certain of his companions, during which he said that he was clear of all debt "except one damned five hundred in the bank of Columbia, which I can pay at any time." It was proved at the trial that there was a note of defendant of five hundred dollars in the bank at the time, and that no other indebtedness of his existed at the time. Yet the objection was successfully made to the acknowledgment that it was too vague and indeterminate, as by it it was left uncertain whether the conversation referred to the writing in question.

In Massachusetts and Maryland a doctrine prevails different from that obtaining in the other states. There it is held that where general indefinite acknowledgments have been made, the *onus* lies on the defendant to show his reference to a different demand: *Whitney v. Bigelow*, 4 Pick. 110; *Bailey v. Crane*, 21 Id. 324; *Woodbridge v. Allen*, 12 Meto. 470; *Guy v. Tams*, 6 Gill, 86. It is probable, however, that proof that defendant owed several demands at the time that the acknowledgment was made, would shift the burden of proof from himself to his adversary: *Bailey v. Crane*, 21 Pick. 324; *Guy v. Tams*, 6 Gill, 86.

In Connecticut, also, though the generally recognized rule was declared in force in *Buckingham v. Smith*, 23 Conn. 453, it appears to have been considerably cut in upon by *Cook v. Martin*, 29 Id. 63. There, upon inquiry made of defendant by plaintiff if he could pay him what "he owed him," and a reply that he could not then, but could next summer, there was held to be an

acknowledgment of indebtedness *prima facie*, including all demands, and therefore of a nature to have been left to the jury.

Whether in the states in which the general rule is in force a general acknowledgment of indebtedness can be aided by proof that there was only one debt subsisting at the time, does not appear to have been decided; the point was waived in *Stafford v. Bryan*, 3 Wend. 535, the court there contenting itself by declaring that as at the time the acknowledgment was made there were two subsisting debts from defendant to plaintiff, the acknowledgment could not apply to either in discharge of the bar of the statute. The case of *Moore v. Bank of Columbia*, 6 Pet. 92, goes far towards denying the aid of evidence of such kind to aid a general acknowledgment. If the acknowledgment, however, is clear in its reference to a debt, and the uncertainty is as to whether it may not have been intended of another claim than that before the court, proof that no other such claim was in existence ought, we think, to remove the objection of uncertainty, and render the admission operative to revive the only debt to which it could possibly apply.

MARLATT v. LEVEE STEAM COTTON PRESS CO.

[10 LOUISIANA, 583.]

THE ACTS OF A PRESIDENT OF A CORPORATION done in the management of the business, and within the scope of his authority, are the acts of the corporation itself.

PROOF OF DELIVERY OF PROPERTY FOR THE PERFORMANCE OF SERVICE THEREON, and its subsequent loss, is a sufficient *prima facie* showing for the plaintiff suing for its loss, alleged to have been occasioned by carelessness and neglect.

WHERE NO OBJECTION HAS BEEN RAISED TO THE NATURE OF THE EVIDENCE, introduced in proof of a fact on the trial, the objection is waived; therefore, if a fact be proved by parol, though the proper evidence should have been by writing, if the objection be not raised on the trial, it can not be on appeal.

The opinion illustrates the case.

Carter, for the plaintiff.

Hoar, *contra*.

By Court, MARTIN, J. The petition charges that the defendants contracted with the plaintiff's agent to unload a boat-load of coal, for a fixed price; that the boat was, for that purpose, delivered into their care and custody; and that through their carelessness and neglect, the boat and coal were sunk and destroyed, wherefore he prayed for damages.

The defendants pleaded the general issue. There was a verdict and judgment against them, and they appealed.

Our attention is first drawn to a bill of exceptions to the charge of the court, instructing the jury, that, if they believed

that the defendants engaged, or contracted, as agents of the plaintiff, to take charge of, and unload the boat, and that it was delivered into the charge of the defendants, it is not necessary for plaintiff positively to prove negligence, but, after showing a delivery of the boat, it is incumbent on the defendants to show that the boat was not lost through any negligence on their part. That the Louisiana code, article 2299, was the law of the land; but that the part of the article which exempts principals from the consequences of the acts of their agents, which they could not prevent, was contrary to general principles, and had, probably, been inserted inadvertently; but that the court did not think this article applied to the present case, because no company can act, except through its president or other agents; and in acts of this kind, the president, or other appointed administrator of the company, is the company itself, to all intents and purposes.

It does not appear to us that the charge is an erroneous one, although we do not concur in the opinion expressed therein, that the article of the code referred to, was inserted inadvertently.

On the merits, the defendants, and appellant's counsel has urged, that the loss was not proved to be the result of any fault in the defendants. That the defendants were not liable, because it was not proven, that the loss might have been prevented by them, and that they did not prevent it.

It is in evidence that the boat was taken possession of by the slaves of the defendants, after the contract made with their agent, and by his order. The jury, therefore, correctly concluded, under the charge of the court, that the defendants were liable, unless they prove that the loss was the result of some event, not within their control.

With equal correctness, and under the direction of the judge, the jury disregarded the second point of defense. In the argument before us, it was urged, that the plaintiff must fail, because he has not proven the authority of the person who acted in behalf of the defendants in making the contract on which the suit is brought.

The witness, who was the agent of the plaintiff in making the contract, has sworn that he made it with the agent of the defendants, to wit, Mr. Lepetre, the president of the company. No attempt was made by a cross-examination, to cause the witness to state the grounds of his knowledge of the agency of the person he contracted with. Neither was any exception made

to the proof of this agency by parol, on the ground that the authority of this agent ought to have been proven by writing, as a company could not appoint an agent by parol. It is also proven, that after this contract, the boat was taken possession of by the slaves of the defendants, and it must be presumed, with the consent of the person to whom the defendants have committed the charge of those slaves.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

AN OBJECTION TO THE INCOMPETENCY OF EVIDENCE is waived if not made at the time that the evidence is offered: *Wait v. Maxwell*, 16 Am. Dec. 391; *Carlton v. King*, 23 Id. 295.

ARNOUS v. LESASSIER.

[10 LOUISIANA, 592.]

INFANCY OF A PARTY CONTRACTING can not be set up by the other party in defense to an action brought by the minor, for the enforcement of the contract.

AN HEIR ASSUMING THE LIABILITIES OF A PURCHASER of part of the succession property is liable to his co-heirs therefor only in the amount due them of the unpaid purchase money, and not in the amount due to each upon a final settlement of the whole succession.

THE case appears from the opinion.

Davis, for the plaintiff.

Stacy and Labauve, contra.

By Court, BULLARD, J. The facts, as exhibited in the record of this case, are, that the plaintiff's minor daughter, the defendant, Timoleon Lesassier, and his brother Luke, who is a minor, are the heirs-at-law of Matilda Rivas. That at the sale of the property belonging to the estate, a plantation in the parish of Iberville, was purchased by one Woodward, for thirty-five thousand one hundred and ten dollars, payable in four annual installments, with a reservation of mortgage on the land, and for better security, he also mortgaged certain slaves. It appears that he paid eighteen thousand five hundred and ninety-eight dollars on account of the price; and having been evicted of a part of the land, in an action brought against him by one Camp, he recovered a judgment in warranty, against the heirs, for ten thousand six hundred dollars, leaving a balance due to the heirs, of five thousand nine hundred and twelve dollars, besides

interest. On the twenty-seventh of January, 1835, Woodward and the heirs, the minors being represented by their tutor, and Lesassier, in his own right, being of age, entered into a contract under private signature, afterwards duly recorded in the parish of Iberville, by which it was agreed and stipulated, that Woodward sold and conveyed to Timoleon Lesassier, the tract of land in question, with its improvements, for the price of eighteen thousand five hundred and ninety-eight dollars, payable in three annual installments, with mortgage on the property.

For further consideration of the sale, Lesassier, in his personal capacity, and Arnous, in his own right, and as natural tutor of his daughter and Luke Lesassier, in his own person, expressly agree with Woodward, that the succession sale and adjudication of the plantation, remain canceled, rescinded, and annulled, and Woodward released from all liability whatever. The last clause of this contract is in the following terms: "The foregoing act of sale being expressly intended and understood as a rescission of said succession sale, adjudication and deed thereon predicated, as a taking back of the property by and on the part of the above parties of the first part, as heirs and legal representatives of said Matilda Rivas, and in their personal capacities, and the mortgage for thirty-five thousand one hundred and ten dollars on the negroes of Elbert Woodward, etc., is hereby released, canceled, and discharged."

On the twenty-first of February, 1835, the same parties went before a notary public, and entered into a more formal agreement in the nature of a transaction or compromise, for the purpose of putting an end to, and preventing, all litigation and difference between them. This contract embraces, in the first place, a preliminary statement of facts, admitted by the parties, in which are recited the purchase of the land by Woodward, the payment of eighteen thousand five hundred and ninety-eight dollars, in principal and interest, the eviction of a part of the land above mentioned, and the judgment recovered by Woodward against the heirs, for ten thousand six hundred dollars. The agreement then states, that Woodward proposes a compromise on the following basis, to wit: That he sells and conveys to Timoleon Lesassier, the said plantation upon the conditions, that Lesassier should put himself in the place and stead of said Woodward, as to the payment of all sums of money due, or to be paid to the co-heirs, on account of the price of the plantation; that Woodward be discharged from all lia-

bility, and the mortgage on his property be canceled. That Lesassier should refund the sum already paid, in three annual installments; and that on this being complied with, Woodward would abandon the judgment obtained against the heirs, and pay another judgment of six hundred dollars, recovered by Camp; and finally, that Woodward had, previously, by act, under private signature, dated January 27, 1835, sold and conveyed to Timoleon Lesassier, the aforesaid plantation, with its appurtenances.

The heirs declare that they accept this proposition; they release Woodward from all further responsibility, and he renounces, abandons, and releases the judgment. The last article of this contract declares, that, "between the persons composing the party of the second part, it is well understood by and between the said Timoleon Lesassier and René Arnous, that the said Timoleon Lesassier, in purchasing the said plantation from the party of the first part, he comes under all the liabilities to pay the price thereof, in the same manner said Woodward became subject to, at his purchase thereof as aforesaid."

This suit is brought by one of the co-heirs, to recover of Lesassier, her share of the original price of the tract of land, as assumed to be paid by the latter, and to maintain her right of mortgage and vendor's privilege.

The defendant, in his answer, alleges, that the private act of the twenty-seventh January, 1835, so far as it relates to the interest of the plaintiff, is null and void, unless the same shall be ratified by her, on attaining the age of majority. That the succession sale could not be legally canceled, and the property be re-invested in the heirs without the authorization of the judge upon the advice of a family meeting. He further avers that the act did not constitute a sale to him, but was intended to re-invest said property in the succession, and that the subsequent authentic act was a nullity, inasmuch as the property had already been re-invested in the succession, and could not legally be sold to the respondent; and that the contract is not binding on the plaintiff's pupil. He denies that he has any title to the property, except as one of the heirs. Finally, he denies that he has received a good and valid title; avers that he is in danger of eviction, and prays that he may be authorized to retain the price, until the plaintiff makes him a complete and perfect title, and secures him from all danger of eviction.

It is clear that the defendant was not without capacity to

purchase, and that Woodward, the owner under the former adjudication, was capable of selling. As between them the contract, under private signature, amounts to a sale, for a specific price, a part of which the vendee engages to pay to Woodward, and a part to the heirs. One clause in the contract appears a little obscure; and might be construed to mean, that, although in relation to Woodward, Lesassier was to be considered as the purchaser, and alone bound to refund the part of the price already paid; yet as between the heirs themselves, the contract should be regarded as a rescission of the succession sale, leaving the property as if no such sale had taken place. And yet, Woodward does not sell to the heirs generally, nor do they come under any obligation to pay any part of the price, except by implication. If this contract stood alone, perhaps such would be its effect upon the heirs themselves. But the subsequent authentic act contains a clause, assented to by Lesassier, wholly inconsistent, it appears to us, with such a pretension. It is expressly agreed, that Lesassier, in making this purchase, comes under all the liabilities to pay the price which Woodward was under, in virtue of the first sale; that is to say, he engages to pay the balance due on the first purchase.

But it is contended, that these contracts are null and void, because the defendant's co-heirs were minors, and incapable of validly entering into such a contract, without the advice of a family meeting, and the authority of the judge. We concur in the view taken by the district judge, of this part of the defense, that the defendant, who was capable of binding himself, can not avail himself of the incapacity of the other contracting parties. Such is the positive doctrine of the code, often recognized by this court: La. code, art. 1785; 6 La. 231.¹

In endeavoring to ascertain the amount due by Woodward to the heirs at the time of his sale to the defendant, it must not be forgotten that he had already paid eighteen thousand five hundred and ninety-eight dollars, and he had a judgment for ten thousand six hundred dollars, which was a legal offset for that further amount, leaving a balance of five thousand nine hundred and twelve dollars, with interest according to the original contract. That is the only amount which the heirs, collectively, could have recovered from Woodward, and the plaintiff is entitled to one third. The defendant is entitled to a credit for that amount, because, by the contract, he takes the place of Woodward; and as he gets but part of the land origin-

1. *Duplessis v. Kennedy.*

ally sold, it would be unjust that he should pay the whole price, without regard to the part, of which his vendor had been evicted. The district court appears to have taken a different view of the rights of the parties, and to have adjudged to the plaintiff the whole amount of the balance supposed to be due her by the succession of her mother. But, it appears to us, she can recover in this action, only so much as the defendant owes on his purchase from Woodward, without regard to a general settlement between the co-heirs. According to a fair construction of the contracts, we consider, that twenty-nine thousand one hundred and ninety-eight dollars, of the original price, had been extinguished, either by payments, or by compensation, consequent on the eviction, and that Lesassier owes the heirs a balance of five thousand nine hundred and twelve dollars, with interest at ten per cent., from April 1, 1833, secured by the vendor's privilege on the land; and the plaintiff must recover one third.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and proceeding to give such judgment as, in our opinion, ought to have been rendered below, it is further adjudged and decreed, that the plaintiff recover of the defendant one thousand nine hundred and seventy dollars and sixty-six cents, with interest at ten per cent., from the first of April, 1833, and the costs of the district court, with the privilege of vendor on the tract of land described in the petition, and that the plaintiff and appellee pay the costs of this appeal.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

EMERY v. GOODWIN.

[18 MAINE, 14.]

JUDGMENT IN AN ACTION OF DEBT ON A GUARDIAN'S BOND, alleging fraudulent management of the plaintiff's estate, is a bar to a suit in equity by the plaintiff seeking to charge the guardian as trustee of the property alleged to have been misappropriated.

BILL in equity alleging that defendant Goodwin and one Trafton, guardians of the plaintiff, a spendthrift, gave bonds as the law directs; that they were licensed to sell certain of the plaintiff's realty to pay his debts; that they sold the same for a sum less than his debts and far less than its value; that Goodwin became the purchaser, and that thirteen months thereafter he sold the same at a large advance. The bill prayed an accounting and a discovery of the persons to whom defendant sold the realty. Plea in bar, that an action of debt was brought by the plaintiff in the name of the probate judge on the bonds referred to in this bill; that in such action plaintiff alleged the fraudulent and negligent management of his property by Goodwin and Trafton, in that, among other things, "one of the guardians was a purchaser of a large amount of timber land; and while guardian, sold it again for a number of thousands of dollars more than he gave, which speculation should be for the benefit of the ward, and the amount should have been credited in the guardian's account;" that the jury found a verdict "that the condition of said bond had never been violated by them, as the plaintiff has alleged;" that the causes of action in the

two proceedings are the same, and that the former judgment rendered on said verdict remains in full force and effect. Demurrer to this plea.

Mellen and D. Goodenow, for the plaintiff.

E. and J. Shepley, contra.

By Court, WESTON, C. J. The plaintiff has filed a demurrer to the defendant's plea, and the question is, as to the sufficiency of the plea, in relation to that part of the bill, to which it was intended to apply. A plea may be interposed to part of the bill; and it will be sustained, so far as it may be a good bar to any of its material allegations.

It is insisted, that the trust charged in the bill, arising from the sale, purchase, and resale of certain estates belonging to the plaintiff, by the defendant, his guardian, has been once before a court of competent jurisdiction, that it has passed in *rem judicatam*, and ought not to be again opened. The former suit was brought in this court, for the benefit of the plaintiff, in the name of the judge of probate, for this county, on a bond given to the judge, by the defendant, with sureties, September 7, 1829, conditioned for the faithful performance of his duties, as guardian to the plaintiff. As the law then stood, the defendant was to give the same bond, for the faithful discharge of his trust, as guardians appointed for lunatics, idiots, and persons *non compos*. In the revision of the laws, a requirement to this effect of such guardians had been omitted; and it was not imposed by statute, until after the date of the bond under consideration.

But although the reference in the statute then afforded no light, in relation to the bond to be given by guardians to spend-thrifts, it was manifestly the will of the legislature, that such a bond should be taken from every such guardian; and it was to be for the faithful performance of the trust confided to him. If the judge of probate, in the exercise of his jurisdiction, has no right to require, or to receive a bond, except where it is prescribed by statute, about which we give no opinion, it may be strongly urged, that the bond in question was thus prescribed. But for the purposes of this investigation, it is sufficient to say, that the bond was given, that the plaintiff sought his remedy under it, that no objection was taken to its validity, and that a suit upon it was sustained in the supreme judicial court. We are not called upon, sitting as a court of equity, to examine into the regularity of these proceedings. The cases

of *Baker v. Morgan*, 2 Dow. 526, and of *Shottenkirk v. Wheeler*, 3 Johns. Ch. 275, very strongly point out the impropriety of such an interference.

If the court had jurisdiction of the bond, which they sustained, and which can not be questioned collaterally under this bill, did it involve the trust upon which the defendant is now sought to be charged? We are of opinion, that it did expressly and directly. The trust charged is an official trust, the faithful fulfillment of which constituted the principal condition of the bond. The brief statement of the plaintiff in that suit, which by our law is a substitute for special pleading, charges the defendant generally, with unfaithfulness in the discharge of his trust as guardian, and with negligent and fraudulent management of the property of his ward. He then proceeds to point out certain specifications. Of what? Unfaithfulness in the trust is as much involved in them as negligent and fraudulent management. If either was made out, the condition was broken. Among the specifications is the very ground upon which a trust in favor of the plaintiff is based in the bill.

It is contended, that the failure of the plaintiff to recover in the former suit may have been, because the defendant might not have been cited to account in the probate office. An administrator is required by law to give bond, conditioned to return an inventory of the estate within three months, and to render an account of his administration within one year. It has been held, that before he can be charged upon the bond, for a failure of these duties, he must be first cited to return an inventory, or to account in the probate office: *Nelson v. Jaques*, 1 Greenl. 138; *Potter v. Titcomb*, 7 Id. 302.

These are positive requirements, in regard to which the place where, and the tribunal before which the business is to be transacted, is the court of probate. The guardian has duties to perform, in the comfortable maintenance of the ward and his family; in the collection and payment of his debts, and in the management and preservation of his property. And although he acts under the supervision of the court, by which he is appointed, and may doubtless be cited to give an account of his trust; yet this is not a duty directly and affirmatively prescribed by statute, as it is in the case of administrators. The duty of a guardian, imposed by statute, and secured by bond, does not depend upon the injunction of the probate court. He could not be cited to appear there, and fulfill his trust. That, with the exception of the return of an inventory, is to be performed

elsewhere. And if not performed, the condition of his bond is broken.

We are not satisfied, that before an action can be maintained upon a guardian's bond, he must be first called upon to appear in the probate court, and show how he has fulfilled his duties. And if it were necessary, no such point was raised between the parties. No averment to this effect was necessary in the declaration, which was debt on bond. The defendant and his sureties did not place their defense upon this ground, in their brief statement; but relied upon a general performance of the condition of their bond. The plaintiff in his counter statement pointed out certain breaches, upon which the parties were at issue. The jury found for the defendant. If they had found for the plaintiff, and the defendant had thereupon insisted, that he was not charged by the verdict, because there was no proof, that he had been cited before the probate court, it might well have been replied, that he put no such point in issue. That he must be regarded as having waived the objection. That he could not be permitted to take the chance of a verdict in his favor, and then interpose a ground of defense, which if earlier made might have been removed by competent proof. But as has been before intimated, whether that suit was regularly conducted or not, it is not our present business to determine. It sufficiently appears, that the jury have found, that there was no breach of the condition of the bond.

But assuming, that the jury responded only to the ground of fraud, made by the plaintiff in his brief statement, as his counsel insist, and negatived the breaches assigned, because not satisfied that fraud existed; it appears to us, that the plaintiff might, and should at the time, have protested against so limited a finding. Or if that was right under his brief statement, it was his own fault thus to have narrowed his ground of action. The bond was to secure the performance of the defendant's trust. The plaintiff elected to resort to that remedy. The trust was directly open to inquiry; but fraud only, as it was evidence of a breach of trust. Nor can we entertain a doubt that the whole subject-matter, the bond with its condition, was within the jurisdiction of the court in that suit. To enforce the faithful performance of the trust, was the very object of the bond. A suit rightfully brought upon that bond, carried with it necessarily a right to inquire as to the trust. The one was inseparable from the other.

It is an elementary principle, of high importance in the ad-

ministration of justice, that the judgment or decree of a court of competent jurisdiction is final, as to the subject-matter determined, and that it can not be opened, before any court of concurrent jurisdiction. The authorities go further; and maintain the position, that the parties are concluded, as to whatever might have been litigated or decided in a former suit: *Marriot v. Hampton*, 7 T. R. 269; *Le Guen v. Gouverneur et al.*, 1 Johns. Cas. 436 [1 Am. Dec. 121]. Kent, J., in the last case says, he knows but two exceptions to this rule; the case of mutual dealings, where the defendant, who omits to set off his counter demand, may bring a cross action; and the case of ejectment, according to the English and New York practice, where the defendant, neglecting to bring forward his title, is not precluded by a recovery against him from availing himself of it in a new suit.

The principle is, that every man is bound to take care of his rights, and to enforce them, when opportunity is afforded him. In *Bateman v. Willoe*, 1 Sch. & Lef. 201, Lord Chancellor Redesdale, says: "The inattention of parties in a court of law, can scarcely be made a subject for the interference of a court of equity; there may be cases cognizable at law, and also in equity, and of which cognizance can not be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defense, because it was impossible for him to do it effectually at law; so where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter, which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction." In *Simpson v. Hart*, 1 Johns. Ch. 91, Chancellor Kent says, he knows of no modern case, where a bill has been sustained upon a point, which had been before a court of law of competent authority, except "upon some new matter of equity not arising in the former case, or for some relief, to which the powers of the court of law were not fully and effectually adequate." The foregoing are the principal cases, cited for the defendant upon this point. Others to the same effect have been also cited; and they might be further extended.

In the opinion of this court, they apply with great force to

the case before us. 1. Because the trust, sought to be enforced in the bill, appears to us to be involved in the former issue. 2. If it was not, it was directly within the condition of the bond, and might, and should have been distinctly presented. 3. It was a trust, necessarily within the jurisdiction of the court, entertaining that suit. And lastly, the facts from which it arises were then known and set forth in the plaintiff's brief statement. The demurrer to the defendant's plea in bar, is accordingly overruled.

FORMER JUDGMENT, WHEN A BAR OR ESTOPPEL AND WHEN NOT.—The decisions in this series on this subject are collected in the note to *Eastman v. Cooper*, 28 Am. Dec. 600.

PORTER v. HOOPER.

[13 MAINE, 25.]

A TENANT IN COMMON OF A MILL CAN NOT BRING TRESPASS against his co-tenant, on the ground that the latter entered into the exclusive occupancy of the mill.

TRESPASS FOR THE MESNE PROFITS BY A TENANT IN COMMON can not be maintained without an actual ouster.

TRESPASS *quare clausum*, by plaintiff against his co-tenants in a certain saw-mill, who, it was alleged, entered into the mill, deforced the plaintiff, and kept him out of the use and occupation thereof. The court ordered a nonsuit, whence exceptions were taken.

Mellen and D. Goodenow, for the plaintiff.

J. Shepley, *contra*.

By Court, WESTON, C. J. If one tenant in common ousts his companion, the party injured may vindicate his right in a real action. And it was decided, in the case of *Goodtill v. Tombs*, 3 Wils. 118, that after having obtained judgment in ejectment, he might maintain an action of trespass for mesne profits; but the opinion of the court was founded upon the judgment, as evidence of an actual ouster, from the time of the demise until it was rendered.

In *Fairclaim v. Shackleton*, 5 Burr. 2604, it was held that the receipt of the whole profits of an estate by one tenant in common, for a period of twenty-six years, without accounting to his companion, did not amount to an actual ouster, which is, in other words, a disseisin. That decision had the effect to pro-

tect the other co-tenant from being barred by the statute of limitations. But it is an authority to show that an actual ouster is an adverse holding, accompanied with acts or declarations, indicating a denial of the title of the other co-tenant. If, however, the facts in that case had not been qualified by the circumstances adverted to in the opinion of the court, they might have been left to the jury as evidence of an actual ouster. In *McClung v. Ross*, 5 Wheat. 116, the court held, that although one tenant in common may oust his co-tenant and hold in severalty, yet that a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his holding is adverse, ought not to be construed into an adverse possession.

In *Doe v. Prosser*, Cowp. 217, a sole and uninterrupted possession by one tenant in common for thirty-six years, without any account to, or demand made, or claim set up by his companion, was regarded as sufficient evidence for a jury to presume an actual ouster of the co-tenant. And Lord Mansfield held, that if one tenant in common in possession denies the title of his companion, his possession becomes adverse, and amounts to an ouster. And undoubtedly an ouster may be proved by any competent evidence, of a character to satisfy a jury that the tenant in possession claims to exclude his companion altogether. Nothing short of this can constitute an actual ouster or disseisin. Whether if such ouster or disseisin is purged by entry, the party injured may thereupon maintain trespass for the mesne profits, as he might after he had obtained judgment at law for possession, it is not necessary to decide in this action. Nor is it necessary to determine whether the forfeiture, of which the plaintiff complains, while it existed, might not have been treated by him, as an ouster or disseisin at his election, for the sake of the remedy by a writ of entry, it being the opinion of the court, that trespass for the mesne profits can not be maintained without an actual ouster, if it can without previously obtaining judgment at law for possession.

The declaration does not charge the defendants with having ousted or expelled the plaintiff from his freehold, but with having held him out of the use and occupation of his proportion of the mill and privilege, from the first of February, 1830, for the period of one year and nine months. And the plaintiff offered to prove at the trial, that the defendants so held him out, until they surrendered his proportion to him in October, 1831. There is nothing either alleged, or proposed to be proved, like an act-

ual ouster or denial of the plaintiff's title. The injury then consists in the defendants' entry and exclusive occupancy for the period charged. And this is not a trespass. The defendants, if they had not been the major owners, had an equal right to the possession with the plaintiff. In *Rising et al. v. Stannard*, 17 Mass. 282, the court say, that before partition, each "tenant in common has a right to occupy any part of the common property, and may assign such possessory right to a stranger. He may even occupy the whole, without being a trespasser." His co-tenant may be prejudiced by his exclusive occupancy, but he can not charge him as a wrong-doer.

The plaintiff's remedy consisted in his right to take possession of the whole himself, if he could do it peaceably. Or he might maintain an action of account, or even of *assumpsit* against the defendants, if they had received more than their proportion of the profits. In the former action between these parties, 2 Fairf. 170, the court do not deny, that if the defendants had received more profits than they had a right to retain, it might have been recovered under the count for money had and received.

If the defendants had removed any of the plaintiff's timber or boards from the mill, or its appurtenances, where he had an equal right to place them, or had taken any of the common property from him, while in his use, or had actually expelled him from the premises, they would have been trespassers; but no averments are made, or proof offered to this effect.

If it had appeared, that there had been an allotment to the plaintiff for a certain period of part of the mill, if it could have been practically and beneficially done, and the defendants had entered upon his part, within the period limited, we doubt not the plaintiff could have maintained trespass *quare clausum* against them: *Welden v. Bridgewater*, Cro. Eliz. 421. And we perceive no reason why he might not have done so, if there had been legally assigned to him the whole mill, for any certain and definite time, and they had entered, while he was entitled to the several and exclusive occupancy. But this does not appear; nor can we regard it as deducible from the fact, admitted by the plaintiff, that the parties were tenants in common of the premises in controversy, and that they held it, as such property is usually held. We are not aware of any settled usage, in regard to the occupancy of mills owned in common, of which we can take judicial notice. If the plaintiff would charge the defendants with any trespass, upon his right

to occupy in severalty, he should have proved, or have offered to prove it affirmatively.

Upon the whole, as the case is presented, the opinion of the court is, that the nonsuit was properly ordered.

Exceptions overruled.

TRESPASS BY ONE CO-TENANT AGAINST ANOTHER.—It may be considered as the almost universal rule, that an action of trespass is, under certain circumstances, an appropriate remedy for the redress of an injury committed by one co-tenant against another. For such a period of time has this been the recognized law, both in this country and in England, that it is a matter of surprise that there should be any gainsaying it. In *Wait v. Richardson*, 33 Vt. 190, and in *Roberts v. McGraw*, 11 Bush, 26, however, general language is employed which might be construed to commit the courts to the opinion that trespass could not be sustained by a tenant in common against a co-tenant. But in looking at the facts then before the court, with reference to which it is always necessary to consider judicial utterances, it may be said that the conditions universally required to sustain the action were not present.

Perhaps the earliest suggestion of the cases in which trespass could be resorted to between co-tenants is found in Coke's Commentary on Littleton, at 200 b. In the discussion of tenants in common, it is said: "If two tenants in common be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action in trespass, *quare vi et armis columbare le pl' fregit et ducentas columbus pretij. 40 s. interfecet, per quod volatum columbaris sui totaliter, amisit*: for the whole flight is destroyed, and therefore he can not in bar plead tenancie in common. And so it is if two tenants in common be of a parke, and one destroyeth all the deer, an action of trespass lieth. If two tenants in common be of land and of mete stones, *pro metis et bundis*, and the one take them up and carrie them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves. If two tenants in common be of a folding, and the one of them disturbe the other to erect hurdles, he shall have an action of trespass *quare vi et armis* for this disturbance."

As is stated in the above passage, the destruction of the article held in common destroys the co-tenancy, which can not thereafter be set up as a defense. And this fact, the destruction of the common property, is one of the circumstances warranting the bringing of trespass by one against his co-tenant. The other instance in which the action will lie, is where there has been an ouster of a co-tenant from the common property: Freeman on Co-tenancy and Partition, sec. 298.

With respect to a co-tenancy of chattels, as each is entitled to the possession thereof, the exclusive possession by one merely will not entitle the other co-tenant to an action therefor. Littleton, 200 a, section 323, says: "If one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him who hath done to him the wrong, to occupy, etc., when he can see his time." It is only upon the destruction of the joint property, or upon such a disposition thereof as is tantamount thereto, that trespass will lie between co-tenants of a chattel: *Lucas v. Wasson*, 24 Am. Dec. 266; S. C., 2 Dev. Law, 398; *Welch v. Clark*, 12 Vt. 681; *Tubbs v. Richardson*, 6 Id. 442; S. C., 27 Am. Dec. 570; *Oviatt v. Sage*, 7

Conn. 95; 1 Water. on Tres., sec. 554. These decisions furnish examples of what would or would not be deemed a destruction of a chattel held in common. In *Lucas v. Wasson*, the common property was cotton, and it had been removed by the defendant, in whose possession it was, to a place unknown to the plaintiff, "so that as to him it is wholly lost, and from its perishable nature, must be destroyed so far as his interest in it is concerned." The turning of hogs into the street whereby they are lost, is regarded as a destruction: *Sheldon v. Skinner*, 21 Am. Dec. 161; S. C., 4 Wend. 525. With respect to the effect of a sale of the chattel by one having only an undivided interest therein, there seems to be some conflict among the authorities. In *Welch v. Clark*, 12 Vt. 681, the court thought that the vendee would be but a co-tenant with the vendor's co-tenant, and deduced from this the principle applicable to the facts then under discussion, "that the attachment of a chattel held in common, on a process against one of the tenants in common as his sole property, can not in any point of view be considered equivalent to a destruction of the chattel, so as to give the other tenant the right to an action of trespass or trover against the attaching creditor, who succeeded to the right of one of the tenants, or the officer who made the attachment." A similar view seemed to have been taken in *Oviatt v. Sage*, 7 Conn. 95, but was discarded in *Ashmead v. Kellogg*, 23 Id. 75. The prevailing opinion in this country is to regard such an assumption of exclusive right by a co-tenant as a tort at the election of the injured co-owners: Freeman on Co-tenancy and Partition, secs. 308-311. And Waterman says, vol. 1, sec. 555, that the injured co-tenant "may at his election affirm the sale and sustain an action against his co-tenant for a moiety of the consideration received, or bring an action of trespass." So also *Coursin's Appeal*, 79 Pa. St. 220.

Similar principles to those above set forth are applied to the destruction of realty held in common. To the general rule that trespass *quare clausum fregit* can not be maintained by one tenant in common against another, there is the exception where one destroys the common property, or so acts with reference to it as to effect a practical destruction of the interest of his co-tenants therein: *Symonds v. Harris*, 51 Me. 14. And in ascertaining what amounts to a destruction of the common estate, a distinction is to be borne in mind between the cases in which one tenant in common appropriates the proceeds, such as the rents, profits, or income of the estate, and where he practically destroys the estate itself, or some portion thereof. The former class, it will be shown subsequently in considering what is an ouster, does not support trespass, whereas in the latter class it may be maintained by the injured co-tenant. For example, the diversion of water from a mill owned in common to one held by a part of the co-tenants is a destruction of the common property within the meaning of the rule: *Blanchard v. Baker*, 8 Me. 253. So also the demolition of a mill by one of the co-tenants, and the appropriation of the materials of which it was composed to his sole use, will support an action of trespass: *McDonald v. Trafton*, 15 Me. 225. Or where a co-tenant removed from a mill and sash factory certain fixtures and machinery, and incorporated them into another mill, the sole property of the defendants, it was pronounced to be a "practical destruction of the common property," within the spirit of the rule: *Symonds v. Harris*, 51 Me. 14.

The second of the general divisions above made in specifying when trespass would lie between co-tenants was stated to be cases of ouster or expulsion of a co-tenant from the common property: 2 Water. on Tres., sec. 946; Freeman on Co-tenancy and Partition, sec. 300 *et seq.* What is meant by an ouster is thus well described in *Warfield v. Lindell*, 38 Mo. 581: "There

must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import, to impart information and give notice to the co-tenants that an adverse possession and an actual disseisin are intended to be asserted against them." This definition is approved in *Busch v. Houston*, 75 Ill. 347; *Ball v. Palmer*, 81 Id. 370, and accords with the current of authority. The reception by one of the co-tenants of all the profits, and his denial of the other's rights, do not amount to an ouster: *Day v. Howard*, 73 N. C. 1; *Caldwell v. Neely*, 81 Id. 114; *Squires v. Clark*, 17 Kan. 84; *Filbert v. Hoff*, 42 Pa. St. 99; *Covington v. Stewart*, 77 N. C. 148; *Neely v. Neely*, 79 Id. 478; *Chandler v. Ricker*, 49 Vt. 128; *Colman v. Clements*, 23 Cal. 245. For a general consideration of what would be deemed an ouster of one co-tenant by another, see the note to *Gillaspie v. Osburn*, 13 Am. Dec. 136, and *Freeman on Co-tenancy and Partition*, c. 10, secs. 300, 301. The sale of the whole estate by one tenant in common, and the grantee's entrance into exclusive possession under such conveyance, claiming title to the whole, is an ouster of the other tenants: *Buchanan v. King's Heirs*, 22 Gratt. 414; *Freeman on Co-tenancy and Partition*, sec. 224 *et seq.* Although in some of the states such a grantee is considered to hold in contemplation of law according to his true title, that which the grantor had right to convey, and not according to his pretended title: *Day v. Howard*, 73 N. C. 1; *Caldwell v. Neely*, 81 Id. 114; *Seaton v. Son*, 32 Cal. 481; *Roberts v. Morgan*, 30 Vt. 324.

The action of trespass for meane profits first brought against a co-tenant after a judgment in ejectment, *Goodtitle v. Tombs*, 3 Wils. 118, is now a recognized form of action in this country: *Bennett v. Bullock*, 35 Pa. St. 367; *Carpentier v. Mitchell*, 29 Cal. 333; *Izard v. Bodine*, 3 Stock. 403; and has been allowed, after a judgment for partition, to recover the meane profits for a period prior to the action for partition, during which the plaintiff had been excluded from the premises: *Cook v. Webb*, 21 Minn. 423. The judgment in ejectment in the former cases, and the exclusion in the latter, were evidence of that ouster requisite for the maintenance of the action.

STANLEY v. BRUNSWICK TONTINE HOTEL CORP.

[13 MAINE, 51.]

A VALID CONTRACT FOR A LEASE ARISES where an authorized committee engages in writing that a certain person shall occupy a certain hotel, he paying therefor in advance, and that he shall have the refusal for two succeeding years.

THE VALIDITY OF THE CONTRACT IS NOT IMPAIRED by the fact that the writing was drawn up on the representation of the lessee that he desired to show it to another for a certain purpose, but did not so show it.

ASSUMPSIT on an instrument as follows: "Mem. The subscribers, a committee of the Brunswick tontine hotel corporation, agree that Mr. Ira Stanley shall occupy their hotel for one year, he paying therefor four hundred dollars per year in quarterly payments in advance, and paying the insurance and all the taxes that may be assessed on the same. And that he shall

have the refusal of the house for the two succeeding years, the rent not to exceed five hundred dollars per year, and the insurance and taxes, provided he keeps a house satisfactory to the committee. John F. Titcomb, Isaac Lincoln, Jno. Dunning, committee. Brunswick, January 15, 1834."

It was admitted that the persons signing were a majority of a committee duly authorized to act in the premises. At the time the writing was made, the house was under lease to one Pike, to expire June 1, 1834. Before the first of June Stanley tendered one hundred dollars to the committee, who then informed him that they had sold the house to Pike. The writing was given to Stanley to enable him to obtain furniture from Mudge & Jewett. But it appeared that he did not show the writing to them. Certain instructions were asked and given, which will appear from the opinion. Verdict for the plaintiff.

Mellen, for the defendants.

Deblois and Fessenden, contra.

By Court, EMERY, J. The first inquiry is, whether the witnesses Cushing and Lincoln ought to have been admitted. They both had divested themselves of the interest which they once had in the property before June, 1834, and declared they had no interest in the event of the suit. No solid objection remains to their admissibility. Ought the instructions requested to have been given, and were the instructions which were given to the jury correct? The jury having found that the contract was truly and absolutely made with the proprietors through their committee for the occupancy of the house, as the plaintiff had declared, and that the plaintiff had performed all that he was by their agreement bound to do; and it being proved that before the occupancy was to commence, the property had been so transferred, that Colonel Pike had obtained a commanding part in it, and the committee were then disabled to give a lease, and the jury have assessed the damages for the breach of the contract in not permitting the plaintiff to occupy the property, it becomes important to consider whether the judge erred in refusing the first requested instruction.

Much discussion has arisen in the English courts, as to what is a lease and what is only an agreement for a lease, because if it be a lease there a stamp of a higher denomination is required. And in *Poole v. Bently*, 12 East, 168, Lord Ellenborough says, that the rule to be collected from all the cases is, that the intention of the parties, as declared by the words of

the instrument, must govern the construction. In Woodfall's *Landlord and Tenant*, pp. 4, 5, it is said, it may be laid down as a rule, that whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession, and the other come into it for such a determinate term, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually, as if the most proper and pertinent words had been made use of for that purpose. A license to inhabit a house amounts to a lease.

If one license another to enjoy such a house or land for such a time, it is a lease. It is a certain present interest and ought to be pleaded as a lease. It may be pleaded as a license. If pleaded as a lease for years and traversed, the lessee may give the license in evidence to prove it. These words in an instrument, "Be it remembered that A. B. hath let, and by these presents does demise," etc., were held to operate as a present demise, although the instrument contained a further covenant for a future lease.

The first instruction requested, was, that if on the evidence, the jury should be of opinion that the alleged contract declared on was placed in the hands of Stanley, for the purpose of showing the same to Mudge & Jewett, as evidence that he should have a lease of the house if he would furnish it, as he expected he should be able to do, but not as a completed contract, then they ought to return a verdict for the defendant. It would have been incorrect to give such an instruction, because it was proved that the contract was made as stated. And the taking of it in writing was for the plaintiff's security. He might show it, or might not, without affecting the validity of the contract, which was to be construed by its own terms.

It was requested secondly, that instruction should be given, that if they should be of opinion that said alleged contract was placed in Stanley's hand as an unfinished contract for the purposes above named, and not to be a complete contract, unless he should give notice to the directors or committee, that he would furnish the house, then they ought to find for the defendant.

It was thirdly requested, that instruction should be given, that if they should be of opinion that when said alleged contract was placed in said Stanley's hands, if it was not a completed contract, but was agreed not to be such unless notice

should be given to the committee in the time and manner above stated, then they ought to find for the defendants.

Substantially, the instructions requested in the second and third place were given, in requiring the jury to be satisfied that the contract was truly and absolutely made, as the plaintiff had declared, and that the plaintiff had performed all that he was, by their agreement, bound to do, and directing their inquiry especially to the fact, whether or not the time was extended, etc.

The fourth requested instruction was, that it was the duty of Stanley to present the signed paper to Mudge & Jewett, for the purpose stated by him to the committee, and according to the condition on which he received it, and then give notice to the defendants within the time agreed on. It could not be material for the court to give a direction, as thus requested, because if Mudge & Jewett, or either of them, or any other person, according to the evidence, had confidence in the plaintiff to aid him without seeing the paper, it was totally indifferent to the defendants. The plaintiff could do nothing without advancing the quarter's rent, which he tendered, and he was at the mercy of the defendant's judgment, whether he kept a house satisfactory to the committee.

The court, in cases of this description, will examine the whole evidence with care and adopt the inferences which a jury might properly draw from it; and, if upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial: *McLanahan et al. v. Universal Insurance Company*, 1 Pet. 170, 182.

Upon the evidence we apprehend substantial justice has been done. And judgment is to be rendered on the verdict.

A LEASE IS A CONTRACT for the possession and profits of lands and tenements, with a recompense of rent or other income, or a conveyance to one for life, or years, or at will, with a reservation of rent or other like return: *Jackson v. Harsen*, 17 Am. Dec. 517 and note. A valid lease for years may be made by a writing not under seal: *Hunt v. Hazelton*, 20 Id. 575. A writing giving, for a valuable consideration, the right to flow lands for a number of years, is a lease. *Smith v. Simons*, 1 Id. 48; and a writing in which the words "hath set and to farm let" are used, amounts to a lease: *Jackson v. Kisselbrack*, 6 Id. 341.

NEWHALL v. VARGAS.

[13 MAINE, 93.]

A FACTOR OR AGENT WHO PURCHASES GOODS FOR HIS PRINCIPAL, and makes himself liable to the original vendor, is so far considered in the light of a vendor as to be entitled to stop the goods *in transitu*.

THE RIGHT OF STOPPAGE IN TRANSITU IS NOT AFFECTED by taking bills drawn by the master upon the vendee.

THE RECEIPT OF COMMISSION by one who becomes responsible for the value of goods shipped to another does not impair the right of stoppage *in transitu*.

THE RIGHT OF STOPPAGE IN TRANSITU on the insolvency of the purchaser is in the nature of an equitable lien, enabling the vendor to resume possession until the price is paid.

THE RIGHT CEASES where the goods are shipped on board a vessel, appointed by the vendee to be transported, not to his residence or to be received by him, but to other markets.

BUT THE RECEIPT OF THE GOODS BY THE MASTER OF THE VENDEE'S SHIP, to be transported to the place of the vendee's residence, does not end the transit.

THE VENDOR IS NOT OBLIGED TO REFUND what may have been received in part payment to entitle him to exercise his right of stoppage.

A VENDOR MAY RATIFY an undirected act of his correspondent in claiming the goods, and thereby make a valid stoppage *in transitu*.

NOTICE TO THE CARRIER, or to any one having charge of the goods before the transit ends, is sufficient, and does not cease merely by the interposition of a claim on the part of the consignee.

REPLEVIN, brought by the administrators of the estate of Samuel Winter, deceased. Winter, owner of the barque William Smith, imported a quantity of lumber to Cuba, where it was sold by Vargas, the defendant, as consignee. Peterson, the master, acting under parol directions from Winter, directed Vargas to purchase a full return cargo of molasses. This was done, the proceeds of the sale of the lumber being applied towards the purchase. Over and above the proceeds, Vargas expended ten thousand two hundred and ninety-six dollars and sixty-two cents for the molasses, including commissions on the purchases and disbursements for the barque. For this sum Peterson drew on Winter in favor of Vargas by five separate drafts. These bills Vargas negotiated, charging a commission of one and a half per cent. About a month after the sailing of the barque, news was received of the death and insolvency of Winter. Vargas immediately sent his brother to this country, clothed with full powers. But before the brother arrived, Fessenden, Thompson & Co., of Boston, correspondents of Vargas, acting for his interest, but without previous authority,

sent one Merrill to Portland, the residence of Winter, and the place to which the barque had sailed, with instructions to stop the goods. He accordingly, on the arrival of the barque, proceeded on board, and demanded of the mate, the captain being on shore, the cargo in Vargas' name, and forbade its delivery to Winter's representatives. On the captain's return, the same demand was made by Merrill of him; but he would not act without advice of counsel. Fessenden, Thompson & Co. then put a keeper on board in Vargas' interest. In the mean time, the brother arrived, and ratified all that had been done. Before this suit was commenced, the brother tendered to the collector the amount of the duties, which were afterwards repaid to the defendant without prejudice to the rights of either. The collector refused to enter the goods, but stored them in the government warehouse. Peterson also made a claim to the goods. The bills of exchange having been protested, he was duly notified. They were taken by one Russell for Vargas' honor. Winter's administrators had demanded the cargo before the arrival of the brother. Judgment was agreed to be entered as the court should direct.

Preble and Daveis, for the plaintiffs.

Mellen and Deblois, contra.

By Court, WESTON, C. J. Joseph Vargas, having due authority therefor, furnished for the intestate's barque a return cargo of molasses, in part payment of which the net proceeds of the outward cargo were applied. It is insisted, that in this business he acted as factor; and as such could not exercise the right, upon which the defendant's title depends. The circumstance of his having purchased the molasses specially for this purpose can make no difference. It was paid for out of his own funds; and he stood in relation to the intestate in the character of a vendor, as much as if it had been supplied from his own warehouse. And it has been directly adjudged that a factor or agent, who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor, as to be entitled to stop the goods: *Feiss et al. v. Wray*, 3 East, 93. Every reason, upon which this right is founded, applies with equal force to a purchaser so circumstanced.

The bills drawn by the master, payable to Vargas, for the amount due on the purchase of the return cargo, were not equivalent to payment. They were the evidence of the debt

due to Vargas; and did not deprive him of any other remedy, authorized by law, where the vendor becomes insolvent. This further remedy, arising from the right of stoppage *in transitu*, is analogous to the lien, which the vendor of real estate has in equity upon the estate sold for the purchase money. It is not affected or impaired, by taking the bond, bill, or note of the purchaser: 4 Kent, 153. The master, in drawing the bills on the owner, was acting on account of the latter; and although sufficiently authorized thereto before, his doings have been since ratified, by the representatives of the owner, in claiming the molasses thus purchased. It was the usual mode of doing business of this sort. And although by the form of the bills, the master may have made himself personally liable, there is no reason to suppose that his security was relied upon by Vargas, or that, by accepting it, he waived other remedies: *Descadillas et al. v. Harris*, 8 Greenl. 298. The master was not acting for himself. He was the mere agent of the owner. In the case before cited from East, where the right of stoppage was recognized, bills had been drawn for the merchandise sold, which had been accepted and negotiated.

Nor do we perceive, that the commissions charged by Vargas, for doing the business and negotiating the bills, can deprive him of the right he claims. As indorser of the bills, he became conditionally liable to the holder, if protested for non-acceptance, or for non-payment. And this business done for the owner, together with the purchase of the molasses, well entitled him to a commission. He became liable upon the bills, not for the benefit of the drawer, but of the holder. It is not easy to conceive how this liability could have the effect to impair any of his remedies against the owner, who was bound to accept and pay the bills. There is very little analogy between this case and that of a factor, who receives a *del credere* commission. The factor there guarantees to his principal the solvency of others, who are the purchasers of his goods. Here Vargas became responsible to others, if the principal, for whom he had purchased and who had purchased from him, did not duly honor his bills. In either case, every legal remedy remains in full force against the purchaser. In the case cited from East, which in many of its points has a near resemblance to the one under consideration, the party who purchased and supplied the cargo, and who negotiated the bills, charged and was allowed a commission.

The right of stoppage *in transitu* upon the insolvency of the

purchaser, has been well settled in the commercial world. It had its origin in the civil law; was first recognized in England in equity, and was subsequently adopted by the courts of common law. It is analogous to the common law right of lien, being an equitable lien, which enables the vendor, after he has parted with his possession, to resume it at any time before the vendee has acquired it, and to retain the goods, until the price has been paid or tendered. The leading principles in relation to the doctrine, have been established by judicial decisions. There is very little conflict of authority, as to who may exercise the right. The principal difficulty has been in some of the cases, as to when the transit ends, upon which the right ceases. In regard to this point, there is not entire harmony in the decisions; and there has been much refinement in some of the distinctions, upon which they have turned. The right of stoppage is a favored claim; and in general it continues until the goods have come to the possession, or under the direction of the vendee.

It is contended, that the right ceased in this case upon the delivery of the goods on shipboard, because the vessel belonged to the vendee, and because the master was his agent. On the other hand it is urged, that as the goods were destined to be delivered to the vendee at Portland, the transit continued, until they were received by him or his representatives at that port. It is conceded that such would have been the fact, had the vessel been a general ship. The decision of the cause will mainly depend upon the question, whether the vessel in this case belonging to the vendee, and in his employment, a different rule is to be applied.

In *Fowler et al. v. McTaggard et al.*, cited in *Inglis v. Usherwood*, 1 East, 515, it was ruled by Grose, J., that upon the delivery of a quantity of tobacco on board a ship, chartered for three years by the vendee, the transit was at an end, and the right of stoppage ceased. And it appears in *Hodgson v. Loy*, 7 T. R. 436, where the case was again cited, that a motion for a new trial was overruled. In the case last cited from East, Grose, J., recognizes it as a general rule, that the delivery of goods by the vendors, on board a chartered ship of the vendee, is a delivery to the vendee himself. Lawrence, J., expressed himself to the same effect, but the right of stoppage was there allowed, upon the construction put upon the law of Russia, where the goods were delivered. In the case before Grose, J., the tobacco was not shipped to be delivered to the vendee, but for a foreign destination.

Where goods are shipped on board a vessel, appointed by the vendee, to be transported not to his residence or to be received by him, but to other markets, there is a termination of the transit, and the right of stoppage by the vendor ceases: *Noble v. Adams*, 7 Taunt. 59; *Stubbs v. Lund*, 7 Mass. 453 [5 Am. Dec. 63]; *Rowley v. Bigelow*, 12 Pick. 307 [23 Am. Dec. 607]. And this is the true principle, upon which *Fowler v. McTaggard* turned, as stated in the opinion of the court, delivered by Lawrence, J., in *Bohllingk v. Inglis*, 8 East, 381, in which Grose, J., who tried the former case, concurred. Lawrence, J., disclaims, for himself and for Grose, any intention in *Inglis v. Usherwood*, to state, that a delivery on board the vendee's ship was a delivery to him, so as to take away the right of stoppage, except as in the case of *Fowler v. McTaggard*, where the goods were sent abroad, stating truly, that *Inglis v. Usherwood* was decided upon the law of Russia. And he further insisted, that neither case was inconsistent with the judgment then pronounced in *Bohllingk v. Inglis*, that the delivery of goods on board of the chartered ship of the vendee, to be transported to him, did not preclude the right of the vendor or consignor to stop the goods *in transitu*, any more than if they had been delivered on board a general ship. The court there expressly repudiate any distinction between a general and a chartered ship; saying that they were misunderstood, if any such inference can be drawn from the former cases. And certainly they were competent to explain their own meaning.

It is a little remarkable, that in *Bolin et al. v. Huffnagle*, 1 Rawle, 9, the supreme court of Pennsylvania, although their attention was called to the case last cited, decided otherwise; and principally upon the authority of the cases there commented upon, giving them an effect and bearing, disclaimed by the court, by whom they were decided. The learned judge, by whom the opinion of a majority of the court was delivered, goes into an elaborate consideration of a delivery actual and constructive; and deduces that it is only where the delivery is constructive, that the right of stoppage exists. A delivery on board the consignee's or vendee's own ship, he calls actual. But a delivery to the servant or agent of the party, is as much actual, as if delivered to the party himself. And whether that servant or agent is specially deputed for the purpose, or some one is deputed, having similar commissions to discharge for others; whether the vendee employs his own vessel or carriage, or causes the goods to be transported for an adequate compensation in

that of another, does not appear to us to make any difference. The delivery is actual in the one case, as well as in the other. The sale is complete. The property is transferred. The right of stoppage is not founded upon any imperfection in the sale, nor does it rescind the contract; it only authorizes the vendor to take the goods, until the price is paid. Two out of the five members of the court, did not concur in the judgment cited from Rawle. The opinion of the dissenting judges seems to us to be best supported by authority.

Stubbs v. Lund, before cited, is a case precisely in point. Chief Justice Parsons goes into a consideration of the question directly, whether the vendee of the goods, being the owner of the ship and appointing the master, places the case, in reference to the right of stoppage *in transitu*, upon any different ground, than if the goods were delivered on board a general ship, and he expressly decides, speaking for the court, that it does not. That if goods are put on board the consignee's ship to be transported to him, the transit continues for the purpose of stoppage, until they come to his actual possession; but that the rule is otherwise if shipped to be conveyed to a foreign market. That case has never been overruled; and was decided, while Maine was a part of Massachusetts. It is true, that in *Musley et al. v. Stubbs*, 9 Mass. 65 [6 Am. Dec. 29], where the same property was in controversy, under the same facts, the court assign additional reasons for coming to the same result. But Sewall, J., by whom the opinion of the court was delivered, says, "with the aid however of the doctrine of stoppage *in transitu*, the question in this case may be more conclusively, and with some, more satisfactorily decided." He then, after examining the authorities, and stating his reasons at large, confirms the doctrine, previously laid down in *Stubbs v. Lund*. And he shows that the cases, apparently conflicting in England, may be reconciled by the distinction, that in the one case goods were shipped for a foreign destination, and in the other, were to be transported to the consignee.

If this doctrine is not re-affirmed in *Rowley et al. v. Bigelow et al.*, 12 Pick. 307 [23 Am. Dec. 607], that case did not require it; turning as it did upon the destination of the goods. There is nothing in it, however, impeaching the former cases. And we hold it to be well-settled law in Massachusetts, and in this state, and we think also in England, that if goods, as in the case before us, are delivered on board the ship of the consignee or vendee to be transported to him, if he becomes insolvent,

the vendor has a right to stop them *in transitu*, until received by the vendee. It results, as a part of the doctrine, equally sustained by the authorities, that the receipt of goods by the master of the vendee's ship, does not put an end to the transit.

He stands in this respect like all other agents, who are employed to transport the goods. In certain cases, where goods have been received by an agent to be forwarded on the further order of the vendee, to an ulterior destination; or where the vendee, having no warehouse of his own, availed himself of that of a packer; or where the vendee obtained the use of the vendor's warehouse for the storage of the goods, the right of stoppage has been held to cease. In these, and in other cases of the same class, cited for the plaintiffs, depending on their peculiar circumstances, we find nothing necessarily, if at all, conflicting with the doctrine, which we have recognized.

Another point taken is, that Vargas should have paid or tendered to the plaintiffs, the amount of the outward cargo and the freight, before he could be allowed to exercise the right he claims. But the right, when enforced, does not rescind the contract: *Hodgson v. Loy*, 7 T. R. 440. The vendee, or his assigns, may, notwithstanding, recover the goods, on payment of the price. And it has been held, that the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment: *Kymer v. Suwercropp*, 1 Camp. 109. The goods are stopped to enforce an equitable lien for what remains unpaid. Hence payment in part, has the effect only to diminish the lien *pro tanto* on the goods detained: *Hodgson v. Loy*, and *Feiss v. Wray*, before cited. The net proceeds of the outward cargo were applied in part payment for the molasses. Of the same character is the increased value, arising from the transportation. The freight is equivalent to a partial payment. If the goods stopped are of greater value, from the former payment and their appreciation here, than is wanted to pay Vargas his balance, the plaintiffs having nothing to do but to pay or tender to him the amount due, and they will have a right to reclaim the molasses. But the vendor, to entitle him to exercise his right of stoppage, is under no obligation to refund what he may have received as part payment.

The goods not having been paid for, and the vendee having become insolvent, the vendor had a right to stop them *in transitu*. Does it appear to have been seasonably exercised in the case before us? We are of opinion that it does. Fessenden,

Thompson & Co. were the correspondents of Vargas, in this country. They were aware that he was in danger of sustaining loss. They interpose to do an act for his benefit, which, tending greatly to promote his interest, it could not but be presumed he would approve. Upon being advised of it, he requests them to take care of his interest. His special agent and attorney, Nicholas Vargas, also adopts and approves the course pursued by his correspondents here. Merrill was sent on board for them, and upon the arrival of the vessel in the outer harbor of Portland, he notified first the mate, and then the master, of the claim of Vargas. This claim, thus interposed and thus ratified, we regard as a competent exercise of the right of stoppage.

Notice to the carrier, or to any one having charge of the goods, before the transit ends, is sufficient for this purpose: *Mills v. Ball*, 2 Bos. & Pul. 457; *Litt v. Cowley*, 7 Taunt. 169. Nicholas Vargas, the undoubted agent and attorney of Joseph, renewed the claim of the latter immediately upon his arrival in Portland, of which he notified the collector, while the goods were in his possession, and then lying in the government stores. This of itself was sufficient, according to the case of *Northey et al. v. Field*, 2 Esp. 613, where a quantity of wines had been lodged in the king's stores, the duties not being paid, and while there, they were claimed by the agent of the consignor; this was held, by Lord Kenyon, a legal stoppage *in transitu*, although they had been previously demanded by the assignees of the consignee. And this last case, where the assignees had only made a demand, differs from the case of *Holst v. Pownal*, 1 Id. 240, where they had taken actual possession. The latter has been repudiated, but Chancellor Kent cites the former with approbation: 2 Kent, 430. The right of stoppage, being a favored claim, may be exercised by notice, but no case has been adduced to show that it ceases upon notice, and the interposition of a claim merely, on the part of the consignee.

Judgment for the defendants.

STOPPAGE IN TRANSITU.—Observing the same distinction as is pointed out in the principal case, is *Rowley v. Bigelow*, 23 Am. Dec. 607, where it was determined that the right of stoppage *in transitu* was at an end where the goods are delivered on board a vessel appointed by the vendee to receive them, not to be transported to him, but to be shipped in his name from his own place of business to a third person. See the citations in that note to various decisions in this series upon this question. In the note to *Haue v. Judson*, *ante*, 377, the subject of stoppage *in transitu* is considered at length.

WYER v. ANDREWS.

[13 MAINE, 168.]

A SHERIFF SHOULD EXECUTE PROCESS with the utmost expedition, or as soon after he receives it as the nature of the thing will admit.

AN OFFICER CAN NOT CONTRADICTION OR INVALIDATE HIS OWN RETURN under oath.

EVIDENCE TO SHOW THAT AN OFFICER AFTER THE RETURN DAY is still considered the agent of the plaintiff for the receipt of the judgment is not admissible.

ACTION on a judgment, in which a return of execution unsatisfied had been made. The case appears from the opinion. Defendant defaulted.

M. H. Smith, for the defendant.

Reed and Knowles, contra.

By Court, EMERY, J. An execution issued upon the judgment declared on, returnable on the fourth Tuesday of December, 1828, was placed in the hands of Jonas Mason, a deputy sheriff of the county of Lincoln, for service and return. The execution bore date September 29, 1828. On the back of that execution is written: "Lincoln, ss. January 1, 1829. I return this execution in no part satisfied. Jonas Mason, deputy sheriff."

At the opening of the case the deposition of this Mr. Mason was proffered to show that this return was in fact made in July, 1834; and that the whole amount of said execution and his fees were paid to him by said Andrews, while it remained in said Mason's hands, but some time after said execution was returnable. The deposition also details a conversation with John Ruggles, esq., and the statement made by said Ruggles, in July, 1834.

This deposition was rejected by the judge. And the question is, whether it ought to have been admitted. No time need be spent in deciding that the statement alleged to have been made by Mr. Ruggles is inadmissible, as it is only hearsay, and he is alive. It remains to inquire whether the residue should have been received.

The sheriff is obliged by the duty of his office to execute every process directed to him by lawful authority, with the utmost expedition, or as soon after he receives it, as the nature of the thing will admit of. And there can not be a surer rule for him to go by, than a strict observance of what is enjoined upon him by the writ. He is not to show favor, nor be guilty of unreasonable delay, nor be guilty of oppression, nor make use of greater force or violence than the thing requires. He can not

arrest before the writ issues. Nor can he execute it after the return, not even the very next day after: *Ellis v. Jackson*, Sid. 229; unless the levy be commenced before the precept is returnable.

A return ought to show obedience to the writ, or a good excuse for omission: 6 Com. Dig., Return, D. 1. As he may say, *quod breve adeo tarde venit, quod exequi non potuit*. No averment lies against any returns of writs, that are definitive to the trial of the thing returned, as the return of a sheriff upon his writs, etc. But it may be, where such are not definitive: *Dyer*, 348; 8 Rep. 121; 2 Cro. 13.

If the return be false in substance though true in words, an action lies against the sheriff: *Doug.* 159. And a sheriff can not make a return contrary to his former return on record: 6 Com. Dig., Return, E. 4. And generally he is not to be let into parol proof to alter the state of facts as returned. Amendments in proper time and manner he may make, and he may show that a mistake was committed, as to ownership of property, and in some other cases.

In *Purington v. Loring*, 7 Mass. 388, the action was trespass against a deputy sheriff. He sold the goods after advertising them twenty-four hours, and, as the report is, he proposed to prove by parol, that he did in fact advertise four days; probably a mistake, instead of forty-eight hours.

The court say, the officer's return must be in writing, and when made upon his precept, and regularly returned, it must be presumed to be true, until the falsity of it be proved. If parol evidence was admissible, there would be great danger of fraud and perjury. If the officer has acted legally, he is liable to no inconvenience in returning truly his proceedings. And if he has not, he ought not to be protected by a false return, whether in writing or by parol.

In *Wakefield v. Lithgow*, 3 Mass. 349, it is said by the court, that the money, which the sheriff received after the return day, he had no legal authority to receive by virtue of the execution. True he might detain it against the debtor to indemnify himself against his exposure to damages from the plaintiff's claim. But unless the plaintiff accepts the money, and so ratifies the acts of the deputy, the matter is to be arranged between the debtor and the officer. But the officer upon principles of law is not to be heard to contradict or invalidate his own return, made under oath, by his own testimony. The deposition therefore was rightly rejected.

Nor can we give countenance to the offer to prove that said Mason was agent of the plaintiffs and had authority to act in the premises and receive for the plaintiffs payment of said judgment, not however by showing any direct authority from the plaintiffs constituting Mason their agent, but by calling sheriffs, deputy-sheriffs, and counselors to prove officers situated as Mason was, are considered, as having such authority.

Such estimation of the authority of officers is calculated to encourage laches in their duty. And to let in that description of proof of authority from the plaintiffs without their own concurrence or acts, would be subversive of the wholesome rules of law. The default of the defendant entered in this action must stand.

AS TO THE DUTY OF AN OFFICER TO SERVE WRITS promptly and unhesitatingly, see *Watson v. Watson* 23 Am. Dec. 324.

CONCLUSIVENESS OF SHERIFF'S RETURN: See *Blythe v. Richards*, 13 Am. Dec. 672; *Diller v. Roberts*, 15 Id. 578; *Denny v. Willard*, 22 Id. 389; *Stinson v. Snow*, 25 Id. 238 and note.

AMENDMENT OF RETURNS OF LEGAL PROCESS: See *Malone v. Samuel*, 13 Am. Dec. 172 and note; *Freeman v. Paul*, 14 Id. 237; *Barnard v. Stevens*, 16 Id. 733; *Berry v. Griffith*, 18 Id. 309; *Heflin v. McMinn*, 20 Id. 58; *Crocher v. Mann*, 26 Id. 684.

HERRIN v. EATON.

[18 MAINE, 193.]

FOR DESTROYING THE COMMON PROPERTY, trespass lies by one co-tenant against another.

ALLEGATION OF LOSS OF PROPERTY through the negligence and carelessness of the defendants is equivalent to an averment of destruction.

TRESPASS on the case. Demurrer to the replication to the plea in abatement. The facts appear from the opinion.

Boutelle, in support of the demurrer.

Wells, *contra*.

By Court, WESTON, C. J. The point more directly presented to our consideration upon these pleadings is, whether the Eatons should have been joined, as plaintiffs in this action. This will depend upon the question, whether upon the facts set forth in the plaintiff's declaration, one tenant in common of a chattel can maintain an action, like the one before us, against his co-tenants.

If one tenant in common destroy the common property, tres-

pass lies against him by his companion: Co. Lit. 200, b. So if one misuse a chattel owned in common, he is liable to the action of his co-tenant for the misfeasance: *Martyn v. Knowlleys*, 8 T. R. 145. In *Fennings v. Lord Grenville*, 1 Taunt. 241, the court admit that trover will lie by the party injured, where one tenant in common destroys the common property. To the same effect is *Mersereau v. Norton*, 15 Johns. 179. In *Oviatt v. Sage*, 1 Conn. 95, the court held, that a destruction of the chattel owned in common by one co-tenant, will render him liable in trover at the suit of another. And this was decided by the court to be the settled doctrine in *Hyde v. Stone*, 7 Wend. 354, and in *Gilbert v. Dickerson*, Id. 449.

The defendants are charged in the plaintiff's declaration, with having carried the oats, confided to their care, in so negligent and careless a manner, that the boat in which they were transported, was filled with water, and the oats lost. Is this equivalent to an averment of the destruction of the oats by the Eatons, who were co-tenants with the plaintiff? We are of opinion that it is. It is not traversed by the plea in abatement, but the defendants there pleaded the joint interest of the Eatons, at the time the oats mentioned and described in the plaintiff's declaration, "were lost and destroyed." They very properly understood the term, lost, to have had the same meaning as, destroyed, in the connection in which it stands.

There are cases in the books, where evidence of destruction by co-tenants much less strong, has been held sufficient. In *Barnardiston v. Chapman et al.*, reported by Lawrence, J., in the case of *Heath v. Hubbard*, 10 East, 121, the plaintiff was owner of one moiety of the ship Triton in common with the defendants, who were the owners of the other moiety.

The plaintiff, being in possession of the ship, the defendants took her forcibly, secreted her from his knowledge, changed her name, and sent her to Antigua, where she was lost. Trover by the plaintiff against the defendants was sustained, the jury having found, under the direction of the presiding judge, the destruction of the ship by the defendants' means; and the court of common pleas, on motion, refused to grant a new trial.

In *Sheldon v. Skinner*, 4 Wend. 525, the parties were tenants in common of a number of swine, which had been fattened and in the possession of the defendant. He gave notice to the plaintiff to attend to a division of them, which he declined. The defendant then divided them himself, and turned the

plaintiff's proportion into the street. This was held to be *prima facie* evidence of the destruction of them, and such as would enable the plaintiff to maintain trover against the defendant, his co-tenant.

If upon the facts in the plaintiff's declaration, he is entitled to sustain either trover or case against the defendants, his co-tenants, which we hold to be warranted by the authorities before cited, Paine, being a participant in the wrong, is equally liable. We accordingly adjudge the plea in abatement bad.

Judgment of *respondeas* ouster.

TRESPASS BY ONE CO-TENANT AGAINST ANOTHER: See the note to *Porter v. Hooper*, *ante*, 490.

BRADLEY v. RICE.

[13 MAINE, 198.]

LANDS BOUNDED BY A POND extend to the margin of the water as existing when the conveyance was made, whether raised by a dam or lowered by widening the outlet of the pond.

To, FROM, OR BY are words of exclusion unless by necessary implication they are manifestly used in a different sense.

COMPLAINT under the statute for flowing the plaintiff's land by means of a dam. The case appears from the opinion.

R. H. Vose, for the complainant.

R. Williams and Wells, *contra*.

By Court, WESTON, C. J. The counsel for the complainant abandons in argument any claim for flowing any part of lot number eighty-five. By the deed of the westerly part of lot number eighty-four, it was bounded southerly on Flying pond, and to extend thence northerly, until one hundred acres were completed. The easterly part of eighty-four was conveyed to run southerly to the same pond, referring to a plan. By that plan that lot is laid down as running to, but not into, the pond. The grantors of eighty-four had previously, by a dam, raised the waters of the pond above its natural margin, for the purpose of creating a reservoir, to feed their mills.

The first question presented is, whether by these deeds, under which the complainant derives title, Flying pond is made a boundary, as it then was, or in its natural state. And we are of opinion, that the pond, as it then was, was the monument contemplated and intended by the parties. The accumulation

of water created by the dam, and that which had naturally collected, formed one aggregate. By the pond must be understood the whole collection of water, as it then existed, and as it presented itself to the eye. So if instead of extending its margin by a dam, the limits of the pond had been contracted, by deepening its outlet, land subsequently conveyed bounded on the pond, would extend to its new margin.

To, from, or by, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. This is clear where land is conveyed bounded by the land of A., and running from the land of B. to that of C. But it is contended, that although lot number eighty-four runs to and is bounded by the pond, it is not limited to its margin, but runs by construction of law to its thread or center. It is true, that where land is bounded on a river or stream, where the tide does not ebb and flow, the owner's title by construction of law extends to the center or thread of the stream. But Flying pond is not a river or stream. No case has been cited, nor have we found any, where that rule of construction has been extended to a pond or lake. Neguasset pond, which was the subject of discussion in *Hathorn v. Stinson et al.*, 1 Fairf. 238, was a mere expansion of Neguasset river or stream. In that case, Parris, J., in delivering the opinion of the court, says: "The law of boundary, as applied to rivers, would no doubt be inapplicable to the lakes, and other large natural collections of fresh water, within the territory of this state. At what point its applicability ceases, it is unnecessary now to consider, as the case does not call for it."

The proprietors of the pond and of the contiguous lands, when they sold, to the pond, must have intended to reserve that as a reservoir for the purposes, to which it had been appropriated. They used a term of exclusion. Their intention and meaning is thereby manifested. Had the land been bounded upon a river or stream, or upon an artificial pond, created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This is law well settled and understood. But it has not been so settled with regard to ponds and lakes. Nor are we aware that there can be one construction for small ponds or lakes, and another for large ones. Where shall the line be drawn? At what point does the one construction end and the other begin? In the absence of any direct authority for extending by construction the bounds, which the grantors have prescribed

in the deeds under consideration, we do not feel at liberty to do so, from any supposed analogy between streams and ponds. It is, to say the least of it, of very doubtful application. The grantees were carried to the pond; and we are not satisfied that they, or the complainant under them, have any right to go further.

In *Waterman v. Johnson*, 13 Pick. 261, the court held expressly that land bounded on a natural pond went no farther than the margin of the water. The construction now urged for the complainant was not there even contended for; although it would have been decisive of the cause.

Judgment on the verdict.

Absent, PARRIS, J.

NAVIGABLE RIVERS AS BOUNDARIES: *Arnold v. Mundy*, 10 Am. Dec. 358 and note; *Cates v. Wadlington*, Id. 609; *Ex parte Jennings*, 16 Id. 447.

NON-NAVIGABLE WATERS AS BOUNDARIES: *Ex parte Jennings*, 16 Id. 447; *Ingraham v. Wilkinson*, Id. 342; *Horne v. Richards*, 2 Id. 574.

CRAM v. AIKEN.

[13 MAINE, 329.]

GOODS SHIPPED ON DECK AND LOST BY JETTISON are not entitled to the benefit of general average.

IDEM.—Nor does the fact that it is customary for vessels plying between the ports between which the plaintiff's goods were being transported, to carry merchandise on deck when the hold is full, entitle the plaintiff to contribution from the owner of the vessel.

IDEM.—Nor does the payment of full freight for goods stored on deck entitle their owner to contribution if they are lost by jettison.

ASSUMPSIT for contribution on the principles of general average, from the owners of a schooner, on the decks of which plaintiff's goods had been placed for carriage and had been lost in a storm by jettison. Plaintiff paid full freight for his goods, and showed that it was customary for ship owners plying between Kennebec river and Boston to carry goods on deck after the hold was full. Nonsuit ordered.

Wells, for the plaintiff.

F. Allen, contra.

By Court, WESTON, C. J. By the commercial law, goods shipped on deck, and lost by jettison, are not entitled to the benefit of general average. Such is the law of France: Com-

mercial code, b. 2, art. 421, which upon this point follows the ordinance of the marine of Louis XIV. Such is the English rule, as laid down by Abbott, in support of which, he refers to a trial before Lord Ellenborough, and another before Chambre, J.: Abb. Sh. 344. No opposing decision in the English courts, has been adduced. The rule does not appear ever to have been questioned or controverted there.

In *Smith et al. v. Wright*, 1 Cai. 44 [2 Am. Dec. 162], it was held that the owners of cotton in bales, laden on deck and thrown overboard for the preservation of the ship and cargo, could not recover for the jettison against the owner of the ship. The same view of the law was taken in *Lenox v. The Un. Ins. Co.*, 3 Johns. Cas. 178. And thus it has been regarded as settled in New York, in accordance with the general maritime law: 8 Kent, 240. The New York cases were cited with approbation as evidence of the law, in the opinion of the court in the case of *Wolcott v. The Eagle Ins. Co.*, 4 Pick. 429.

To the same effect is the decision of this court in *Dodge v. Bartol et al.*, 5 Greenl. 206 [17 Am. Dec. 233], where the commentary of Valin on the ordinance of the marine is cited, in which he notices some exception to the French rule in regard to boats and small vessels, which must be peculiar to their navigation, as we find no evidence that it has been adopted elsewhere.

While the general law has been admitted in argument, it is insisted that this should be an excepted case, because the plaintiff paid full freight. Neither the master nor the owner can be chargeable with any fault, in putting his goods on deck. The plaintiff must be understood to have assented to their being placed there, as he knew that they could not be carried in the hold. In *Dodge v. Bartol*, the payment of half freight upon the goods there, was noticed as a reason why, upon principle, the owner should have less protection; but it is not the reason generally given for withholding from goods laden upon deck, and lost by jettison, the benefit of general average. The cause assigned is, because goods there laden are peculiarly exposed to peril, and increase the difficulty of the navigation. It is desirable that uniformity should be observed, in deciding upon questions of maritime law, in which all commercial nations are interested. Exceptions to be allowed, should be as well established as the rule; and we find no sufficient authority for the exception contended for, in the case under consideration.

Nonsuit confirmed.

WHAT LOSSES ARE PROPER SUBJECTS FOR GENERAL AVERAGE: *Maggrath v. Church*, 2 Am. Dec. 173 and note; *Walker v. Union Insurance Co.*, 14 Id. 610 and note; *Tectamas v. Olamageran*, 22 Id. 127 and note; *Scudder v. Bradford*, 25 Id. 355.

LEADBETTER v. ETNA INSURANCE Co.

[13 MAINE, 265.]

CONDITION IN A POLICY OF FIRE INSURANCE that the assured must procure a certificate of a magistrate, notary public, or clergyman, most contiguous to the place of the fire, that the fire occurred without fraud, before the loss shall be deemed payable, is precedent to the assured's right of recovery. And such certificate must be by the nearest, not by any magistrate.

ACTION on a policy of insurance on the plaintiff's house, furniture, barn, etc., for two thousand dollars. One of the conditions of the policy was that the assured should "procure a certificate under the hand of a magistrate, notary public, or clergyman most contiguous to the place of the fire, and not concerned in the loss or related to the insured or sufferers, that he is acquainted with the character and circumstances of the person or persons insured, and knows or verily believes that he, she, or they really, and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount therein mentioned, and until such proofs, declarations, and certificates are produced, the loss shall not be deemed payable." A certificate by a justice of the peace to comply with this condition was furnished the defendants. But on the trial it appeared that a clergyman and a magistrate each lived nearer the scene of the fire, and had each refused to give a certificate. On the trial a nonsuit was ordered, which was to be taken off if the whole court should think proper.

Otis, for the plaintiff.

S. W. Robinson, *contra*.

By Court, *WESTON*, C. J. We are clearly of opinion, that the plaintiff, at the trial, failed to exhibit the preliminary proof, made a condition precedent to his right to recover. It was a condition fairly and rightfully imposed, fully accepted, and made a part of the policy. It was of a character not to be misunderstood, and was interposed to protect the defendants against fraud. As insurance companies, who enter into extensive contracts of this kind, are liable to great impositions, they are justified in taking every precaution which common prudence may suggest.

In *Worsley v. Wood et al.*, 6 T. R. 710, which was upon a policy against fire, it was one of the printed conditions accompanying the policy, that in case of loss, the assured should procure from the ministers and church wardens, and from some respectable householders of the parish, not concerned in interest, a certificate like that required in the policy under consideration. The assured procured and delivered a certificate in the requisite form, from four reputable householders of the parish, and alleged in their declaration, that the minister and church wardens of the parish, wrongfully and unjustly, and without probable cause, refused to join in such certificate. Upon an issue being made up upon this point, the jury found in favor of the assured. The case was twice argued, and received great consideration from the court. It was finally decided, that the certificate of the minister and church wardens was a condition precedent to the right of the assured to recover. That if unreasonably refused, it was their misfortune, but that without it, they could not prevail. That the company had a right to impose their own conditions, for which they were not bound to receive any substitute whatever.

In *Dawes v. The North River Ins. Co.*, 7 Cow. 462, which was assumpsit on a policy against fire, Savage, C. J., who delivered the opinion of the court, says: "In cases of this kind, great strictness is required; and the plaintiff can not recover, without a literal compliance with the conditions." And in the *Columbian Insurance Company v. Lawrence*, 2 Pet. 25, the certificate of a magistrate or sworn notary, required by the conditions, was held indispensable preliminary proof.

In the case before us, the defendants were not to be held to pay, unless the assured procured the specified certificate from the nearest magistrate, notary, or clergyman. This was withheld, for what reason does not appear; but without it, the plaintiff can not prevail in this action.

Nonsuit confirmed.

CHAMBERLAIN v. REED.

[13 MAINE, 357.]

ADJUSTMENT OF A GENERAL AVERAGE made by a broker on the protest and evidence furnished by the master may be set aside at the suit of owners of goods, by showing the culpable negligence or want of skill of the master.

THE MASTER, ON AN ADJUSTMENT OF GENERAL AVERAGE, HAS A LIEN UPON goods liable for contribution.

MONEY PAID UNDER A MORAL COMPULSION to obtain property improperly detained is not a voluntary payment. Nor is the principle affected by the fact that the payment was made pursuant to a written promise.

ASSUMPSIT for money had and received. The money was paid by plaintiff's agent to the defendant, the master of a vessel, who refused to release certain property of the plaintiff on board the vessel, unless the sum in controversy were paid him as general average awarded to the defendant from the plaintiff by a broker who had adjusted the matter. Verdict for the plaintiff, subject to the opinion of the court in respect to the correctness of the instruction, that the award, based on evidence furnished by the master alone, was not conclusive, and of the refusal to charge in favor of the defendant.

F. Allen, for the defendant.

Mellen, contra.

By Court, **WESTON, C. J.** We are satisfied with the adjustment made by the broker of the general average, and of the specific charges upon the deck load; and that if no charge of negligence or want of skill was justly imputable to the master, the adjustment was warranted by the facts, upon which it was made. And upon the same assumption only can it be conclusive upon the plaintiff, and upon all concerned. If it were otherwise, as the adjustment was procured by the master, without the assent or privity of the other parties, upon the protest and other evidence furnished by him, he would escape all responsibility, however gross might have been his negligence, or palpable his want of requisite skill. The papers submitted to the broker, disclose no failure of duty in the master. It was a point not submitted to his consideration; and most extraordinary would it be, if the result to which he came, upon facts which he received from the master, should close the door to all liability on his part to those, who had confided their property to his care.

The jury have found that the loss, a part of which was visited upon the plaintiff, was occasioned by negligence or want of skill in the defendant. It is very manifest, this being ascertained, that he had no just cause to receive the money, sought to be reclaimed in this action. It is however insisted, that this action ought not to prevail, the plaintiff having a full knowledge of all the circumstances, and the money being voluntarily paid by his agent. A question then arises, was this a voluntary payment?

In *Chase v. Dwinal*, 7 Greenl. 134 [20 Am. Dec. 352], it was decided, upon an examination of the authorities, that a payment made under a moral compulsion, to obtain property improperly detained, was not voluntary. The same principle is distinctly laid down in the case of *Shaw v. Woodcock*, 7 Barn. & Cress. 73, cited for the defendant. The master has a lien upon goods liable for contribution, on an adjustment of general average. Accordingly the defendant in this case refused to deliver the plaintiff's lumber to his agent, until his claim was satisfied. In this he would have been justified, but for the facts now settled by the jury. The agent, protesting that the demand was unjust, and notifying the defendant that the money would be reclaimed, finding that he could not otherwise liberate the lumber, agreed to pay the sum required, and having given a writing to this effect, paid the money after the lumber was delivered. Payment made under these circumstances, we can not regard as voluntary. It is contended, that the agent having got the lumber, should have withheld the money. We can not admit that such a breach of faith became a legal duty, necessary for the protection of the rights of his principal. The moral compulsion was still upon him; and the subsequent payment can, in no fair and just sense, be pronounced voluntary. We are of opinion therefore, that the instructions requested were properly withheld.

The testimony in the case is somewhat conflicting; but the jury have passed upon it. It is their province; and we perceive no sufficient reason for the interference of the court.

Judgment on the verdict.

MASTER OF A VESSEL has a general lien on his cargo for freight and charges: *Everett v. Coffin*, 22 Am. Dec. 551.

CARLE v. DELESDESNIER.

[13 MAINE, 363.]

AN ACTION OF TRESPASS DOES NOT LIE AGAINST A SHERIFF for arresting, in obedience to his precept, a person who happens to be privileged from arrest.

TRESPASS for arresting a man on his way home from a criminal trial at which he had been a witness. The defendant was a sheriff, and acted under a writ of execution. Verdict for the plaintiff.

F. Allen and Bridges, for the defendant.

Mellen and Uhandler, contra.

By Court, WESTON, C. J. The authorities cited for the defendant, to show that an action of trespass does not lie against a sheriff, for arresting a person, in obedience to his precept, who happens to be privileged from arrest, are numerous and direct. Among the most prominent are *Turleton v. Fisher et al.*, 2 Doug. 671, and *Cameron v. Lightfoot*, 2 W. Bl. 1190, and *Cameron v. Bowles et al.*, for the same cause, Id. 1195. The first was brought by a party privileged from arrest, under an insolvent act, which prescribed that he should not be liable to be arrested, by virtue of any civil process out of any court; and if arrested, that he should be discharged. In violation of this exemption, he had been arrested under a writ of attachment from the court of exchequer. The general doctrine laid down by the court was, that trespass and false imprisonment will not lie against a sheriff or his officer, for arresting in virtue of a precept, a person privileged from arrests. Buller, J., says in that case, "the general law as to sheriffs is, that if a sheriff has acted in obedience to the mandate of the court, he is excused. If he arrest a peer, the writ is erroneous, yet he is not a trespasser, for executing it." And yet a peer of the realm, having high duties to perform, holds his privilege principally for the sake of the public.

In the cases from William Blackstone, both of which were for the same cause, a witness had been arrested under a precept, while on his return from court. He brought trespass and false imprisonment against the officer, and a verdict was taken in his favor, subject to the opinion of the court, whether the action would lie. The court held that it would not, and Chief Justice De Grey, by whom their opinion was delivered, goes into a consideration of the authorities, and adverts to many cases, where a privilege from arrest exists, yet he adds, that "though in many cases the process is declared void, yet in none has any instance been produced, of an action of false imprisonment being brought, much less will it lie in the present case, where the writ is not void, nor the arrest illegal, but only improperly timed."

In *Brent v. Broadstreet et ux.*, 3 T. B. 183, Lord Kenyon regarded it as incomprehensible to say, that a person shall be considered as a trespasser, who acts under the process of the court. *Plummer v. Dennett*, 6 Greenl. 421 [20 Am. Dec. 316],

did not turn upon any personal privilege, but the court advert with approbation to cases and principles, which bear against the maintenance of the action under consideration.

Although there must have been numerous arrests upon precepts, of privileged persons, who have been discharged upon motion or upon *habeas corpus*, not one case has been cited or referred to, where trespass has been brought against the officer, and been adjudged to lie. This of itself is evidence, not to be disregarded, that the law has been understood to be against it.

If, for the protection of persons, entitled to an immunity from arrest, in certain cases, or for certain periods, it is necessary that they should be allowed to maintain an action of trespass against an officer, in cases like the one under consideration, in addition to the remedy afforded by *habeas corpus*, it must be granted by the legislative power. We do not feel at liberty to sustain it, against the current of authorities, which are of too uniform and decided a character, to be affected by any inference to be drawn by analogy, from the case of *Illsley v. Nichols et al.*, 12 Pick. 270. The opinion of the court is, that if the defendant is liable at all, it is not in this form of action. The verdict is accordingly set aside.

Plaintiff nonsuit.

JUSTIFICATION OF OFFICERS BY THEIR PROCESS: *Watson v. Watson*, 23 Am. Dec. 324 and note; *Commonwealth v. O'Cull*, Id. 393, and *Savacool v. Bough ton*, 21 Id. 190, in the note to which the subject is considered at length.

MIDDLE BRIDGE PROPRIETORS v. BROOKS.

[13 MAINE, 391.]

WHETHER A DUTY IMPOSED BY LAW ON A CORPORATION is directory or essential to the enjoyment of some of their rights, must be determined by its nature and object, by the public convenience, and by the legislative intention.

REGULATION THAT A TOLL-ROAD COMPANY should keep the rates of toll constantly exposed to view, is mandatory; and if not complied with, deprives the company of the benefit of the penalty for passing without paying toll.

TRESPASS, to recover a penalty of not less than five nor more than fifty dollars under the statute of 1827, c. 357, for passing the plaintiffs' bridge without paying toll. Verdict for the plaintiffs. The facts appear from the opinion.

J. Granger, for the plaintiff in error.

T. J. D. Fuller, contra.

By Court, WESTON, C. J. The assignment of errors in this case has been extended to a great number of specifications, most of which have been satisfactorily answered. By the third section of the act, under which the plaintiffs were incorporated, it is provided that they shall, at the place where the tolls are collected, cause the rates of toll to be fairly and legibly painted in large or capital letters, and kept constantly exposed to the view of passengers. It is true, that many provisions in a charter, or in the by-laws authorized under it, may be regarded as directory merely. Others are such, as are to be inquired of only between the government and the corporation; or such as relate to the internal management of their affairs with their officers, or with the individual corporators, which are not to be called in question by a stranger.

Whether a duty imposed upon a corporation by law is directory, or essential to the enjoyment of some of their rights, must be determined by its nature and object, by the public convenience, and by what may be understood to have been the intention of the legislature: *Bank of the United States v. Dandridge*, 12 Wheat. 64. The duty referred to is one which, from its nature and object, ought by no means to be remitted. It answered a double purpose; as an admonition to passengers, of what was required from them, and to protect them from the imposition of being called upon to pay a higher rate of toll, than was authorized by law. And that the intention of the legislature might not be misunderstood, they have directed, that what they required to be done, should be constantly exhibited to public view.

It is a regulation, in the fulfillment of which, a party charged with having incurred a penalty, for passing without the payment of toll, when thereto required, is interested. And we are of opinion, that the corporation is not authorized to enforce the penalty, while there is a failure, from whatever cause, to exhibit the rates of toll in the manner required by law. It does not appear to us, that they have a claim to exact a penalty from a passenger, who passes without payment of toll, although demanded of him, which was all that was proved against the original defendant, while they omitted to exhibit to his eye, one of the evidences of their right, which it is their duty constantly to expose to view.

The defendant used no other force, than what is merely constructive. It may have been enough to bring his case within the operation of the statute, provided the plaintiffs had done their

duty in regard to the subject-matter, but we think not otherwise. Nor does it in our judgment make any difference, that their toll-board may have been wantonly and mischievously destroyed. For an injury of this sort, they have a remedy by action; and their property is protected by penalties. If their board is destroyed, or the letters become obliterated by time, accident, or design, they should cause it forthwith, as soon as may be, to be restored and the letters renewed. It can not otherwise be constantly exposed to the view of passengers.

Nichols v. Bertram et al., 3 Pick. 342, was an action for forcibly passing a turnpike gate, without paying toll. After the corporation was established, in whose behalf the plaintiff, their treasurer, sued, it was provided by a general law, that turnpike corporations should not be entitled to demand or receive toll, unless they erected a sign-board, with the rates of toll written or printed in a certain manner. In the act by which they were created, the duty was imposed in somewhat different language; and it was not in terms made a condition, upon which their right to receive toll depended. The court held, that their rights and duties were to be determined by their act of incorporation, and not by the subsequent general law. They further held, that the corporation had complied with the act. And the implication evidently is, that had it been otherwise, the penalty sought could not have been recovered.

In this case the evidence is, that the toll-board of the corporation was destroyed, at least as early as the ninth of May. On the fifteenth, when the alleged trespass was committed by the defendant, it had not been restored. There was at that time no such board exhibited to the view of passengers. And in our opinion the judge below should have charged the jury, as requested, that this omission was fatal to the action.

Judgment reversed.

DUNCAN v. SYLVESTER.

[13 MAINE, 417.]

TRESPASS QUARE CLAUSUM WILL NOT LIE by a tenant in common of land against his co-tenant.

A CAUSE BROUGHT BEFORE AN APPELLATE COURT ON ONE COUNT can not be heard on another count struck out in the court below.

TRESPASS *q. c. f.*, by a tenant in common of a fishery, against his co-tenant. The declaration contained a second count, *de bonis asportatis*. The second count was struck out before trial

of the demurrer to the declaration, but the court, stating that the action could not be sustained on the first count, asked leave to restore the second count.

Thayer, for the plaintiff.

W. G. Crosby, *contra*.

By Court, *WESTON*, C. J. The plaintiff had a right to place his net where he did; and the defendants in cutting or casting it off, and turning it adrift, were guilty of a trespass. But it is contended, that the plaintiff can not maintain trespass *quare clausum*, for the injury. The objection is a technical one; and, furnishing no defense to the merits of the case, we have not been disposed to regard it with favor. But upon consideration, we are of opinion that it is sustained by authority. Littleton in his *Tenures*, sec. 322, says, if two have an estate in common for a term of years, and the one put the other out of possession, the injured party may maintain ejectment. But in the next section he states, that although ejectment will lie, trespass *quare clausum* will not, for one tenant in common against another. Coke, in commenting upon this section, says, if there be two tenants in common of land, and one take up and carry away the mete stones, the other may maintain trespass, *vi et armis*, for the injury. And if there be two tenants in common of a folding, and one of them disturb the other in erecting hurdles, he may maintain the same action for the disturbance. But he does not say that trespass *quare clausum*, can be brought in either case: Co. Lit. 200 b.

Whenever a party has an exclusive right to the possession, this action may be maintained, although he has not an absolute right to the soil, or the whole property therein. And it may be supported for a trespass in a portion of a common field, after an allotment in severalty to the plaintiff: *Welden v. Bridgewater*, Cro. Eliz. 421.

The opinion of *Wilde, J.*, was against the action in *Keay v. Goodwin*, 16 Mass. 1, where one tenant in common disturbs the temporary but rightful possession of another. And in our judgment this opinion is in accordance with the principles of law. It is submitted to the court, whether if the plaintiff's count, *de bonis asportatis*, should be restored, he would be entitled to judgment upon that count only. If the action can not be maintained upon the count as it stands, it ceases to be an action of trespass *quare clausum*, which alone justified the demurrer in the common pleas, under which it was brought

into this court: Stat. of 1829, c. 444. To decide otherwise would have the effect to justify an evasion of the statute, by the insertion of a formal count of this sort, in cases where it is not warranted by law: *Snow et al. v. Hall*, 3 Greenl. 94. As it is brought before us, we can not sustain it, as an action *de bonis asportatis*.

TRESPASS BETWEEN CO-TENANTS: See the note to *Porter v. Hooper*, ante, 480.

MERRIAM v. MITCHELL.

[13 MAINE, 480.]

VERDICT WILL NOT BE SET ASIDE on the ground of the admission of irrelevant and immaterial evidence.

RECORDS OF A POST-OFFICE ARE ADMISSIBLE to show the transactions of the office, but are not-conclusive.

PROSECUTION OF AN INNOCENT PERSON for the abstraction of a package from the mails, which package had been overlooked through carelessness in the search, is without probable cause, notwithstanding the assurance of the prosecutor, of error and mistake on his part.

FROM THE WANT OF PROBABLE CAUSE, MALICE may be found.

ACTION for malicious prosecution. Merriam, a deputy under Colonel Hall, postmaster at Camden, was arrested by Mitchell, governmental agent for the detection of certain mail robbers. Mitchell had Merriam arrested on the ground that he had abstracted a certain decoy package sent to Bath. Mitchell and another examined the mails before they reached Camden, and saw the package in them, and again examined the mails just beyond Camden, and did not find the package. As a matter of fact it was then in the mails. The grand jury refused to indict Merriam. Verdict for the plaintiff in the sum of one thousand six hundred and sixty-six dollars. Motion for a new trial.

Preble, for the defendant.

Sprague and G. M. Chase, contra.

By Court. The testimony of Albert Reed and of Francis Crooker, in regard to the letter directed to a lady, and opened by the defendant at Lincolnville, if not admissible as a part of what was said and done by him on the tour, which led to the prosecution of the plaintiff, was at most irrelevant and immaterial, and in our judgment affords no sufficient ground for disturbing the verdict. It does not appear, that the attention of the judge was called at the trial to any objection made to a

part of O'Brien's deposition; and he was not desired to rule upon its admissibility. The idle rumor heard by O'Brien of the arrest of Colonel Hall, was known at the trial to have been false. It was altogether immaterial, and could not have operated to the prejudice of the defendant. That he entertained suspicions of some postmaster west of Belfast, is abundantly proved, and is not controverted.

The records of the Camden post-office were kept in pursuance of law. They were public records, made by a sworn officer of the government; and were in our opinion legally admissible in evidence, to show the transactions of that office. If fraudulently or corruptly kept, they were liable to be controverted, but were entitled to credence, until impugned or impeached.

The judge instructed the jury, that there was, in point of law, no probable cause for the prosecution; but he submitted certain questions of fact to their consideration, the determination of which was designed to enable the court to decide upon the correctness of this instruction. From their finding it appears that the plaintiff was entirely innocent of the charge, preferred against him. And it does not appear from any evidence in the case, that any ground of suspicion could justly or fairly arise from any part of his conduct. It further appears from the finding of the jury, that the package, supposed to be missing, was in the mail-bag, when searched by the defendant; and it was in proof, that it reached its destination at Bath, in due course of mail.

The cause of the prosecution, then, was the fact that the package was overlooked by the defendant. That there must have been some carelessness or defect in the search, is sufficiently apparent. The assurance of the defendant, however strong it may have been, was based upon his own error, mistake, or negligence; for such it undoubtedly was; although participated in by others, who assisted in the search. The proceedings before the justice and subsequently before the grand jury, have no other foundation. We can not but regard it as too much to hold this to have been probable cause, to justify a prosecution against an innocent and unoffending man, who had given no color for suspicion against him.

Reparation is demanded in such a case, by the plainest dictates of common justice. If a man had prosecuted and imprisoned a faithful servant, on the false charge of purloining an article of value, which had remained locked up in his desk, merely because he had carelessly overlooked it, he could not

and ought not to rest satisfied with himself, until he had made restitution. He could not reasonably expect, that the claim of the injured party for damages in a court of justice, could be defeated by the strength of his assurance. If such a doctrine were established by law, innocence might indeed escape the punishment due to guilt, if the error were seasonably discovered, but it would be without indemnity for losses and expenses growing out of the charge, to say nothing of personal suffering and lacerated feelings. The pretense of error and unintentional mistake would become a cloak, to give impunity to malice, and fraud, and falsehood.

The defendant was manifestly excited in the attempt to bring the business, which had been confided to him, to a successful termination. He knew that one package had been lost at Lincolnville. It should have occurred to him, that the decoy package might have been lost in the same manner. It was a fact, in itself calculated to weaken any just conviction, that it was abstracted by the hand of the plaintiff. Nor did the more decisive fact of the arrival of the letter, impair his assurance; for when apprised of that by Colonel Hall at Wiscasset, he still insisted upon the guilt of the plaintiff.

The jury have expressly found malice. They had a right to do so, from the want of probable cause. To them also was properly submitted all the testimony, bearing upon the plaintiff's claim for damages. It belonged to them to estimate the loss to the plaintiff, arising from the prosecution; and we perceive no sufficient reason to set aside their verdict upon that, or upon any other ground, taken for the defendant.

Judgment on the verdict.

MALICIOUS PROSECUTION, to support an action for, malice and want of probable cause must be shown: *Kelton v. Bevins*, 5 Am. Dec. 670; *Bell v. Graham*, 9 Id. 687; *Turner v. Walker*, 22 Id. 329; *French v. Smith*, 24 Id. 616; *Mowry v. Miller*, Id. 680; *Adams v. Lisher*, 25 Id. 102. The existence of a probable cause, though the prosecution may have been malicious, will defeat the action: *Utner v. Leland*, 10 Id. 48; *Plummer v. Gheen*, 14 Id. 572; *Adams v. Lisher*, 25 Id. 102. And if the plaintiff was actually guilty of the crime, though at the time of the prosecution it was unknown to the prosecutor, yet the plaintiff can not recover: *Adams v. Lisher*, 25 Id. 102. In respect to what "probable cause" means, and when it exists, see the note to *Frowman v. Smith*, 12 Id. 265. Malice will be inferred from the want of probable cause: *Frowman v. Smith*, *supra*, in note.

CHAMBERLAIN v. DOVER.

[13 MADE, 466.]

TOWN CLERK MAY, WHILE HE REMAINS IN OFFICE, AMEND THE RECORDS of town meetings, to conform to the truth.

THE ACTS OF THE MAJORITY PRESENT AT TOWN MEETINGS bind not only the minority, but all who are absent.

PUBLIC NOTICE OF TIME AND PLACE OF MEETING must be given; and a meeting can not be adjourned by the few townsmen present to a distant part of the town on the same evening, of which time and place of adjournment other townsmen subsequently arriving receive no notice.

A MEETING FAIRLY ORGANIZED possesses the incidental power of adjournment to a future time.

TOWN MEETINGS MUST BE HELD at the place appointed. A meeting to be held at a school-house must be held within its walls.

ADJOURNED MEETING MUST BE FROM A REGULAR MEETING valid as to time and place.

WHERE THE RECORD SHOWS THAT THE MEETING WAS NOT AT THE PLACE APPOINTED, testimony is admissible to show that an irregular meeting was held at another place, and what was there done.

THE RECONSIDERATION AT A REGULAR MEETING of acts done at a previous irregular meeting can not be construed as a ratification of such acts.

ASSUMPSIT on a contract for the construction of a bridge, made with the plaintiffs by a committee of the town of Dover. To prove the authority of the committee, the town clerk, in the years 1834 and 1835, introduced the records, on the margin of one of which were entries made, not at the time of the other entries, but afterwards while he was still clerk, and relating to the meeting appointing Patten and Favor. The entry on the margin the clerk swore was the one in fact true, and was: "Dover, January 15, 1834. The inhabitants of Dover met in the highway near the school-house, in district No. 2, and read the warrant in the open air, and adjourned the meeting to A. S. Patten's store." On the record was the continuation of the minutes of this adjourned meeting: "Art. 1. Voted, and chose Benj. Spaulding, moderator to govern the meeting. 2. Voted to rebuild the bridge at the great falls." Favor, Bartlett, and Patten were chosen a "contracting and building committee," but Bartlett did not act. The records contained proceedings of a legal meeting held in February, 1834, reconsidering the votes taken at the January meeting. The defendants produced evidence showing that the meeting in January was appointed to be held at the school-house in district No. 2, at one o'clock; that at half-past one o'clock the town clerk and four or five other persons met near the school-house; that there was a lock on

the door and a snow-drift in front; that the weather was cold and no fire there, and they did not enter the house; that after about five minutes the town clerk read the warrant in the open air, and Patten or Favor moved to adjourn to Patten's store, which motion was carried; that the store was more than a mile from the school-house; that no notice of the place to which the meeting was adjourned was left on the school-house door; that several persons coming to the school-house after the adjournment, seeing no meeting and no notice, went home, and that at Patten's store five men voted in favor of what was done, four against it, and that there were three or four persons present who did not vote. It also appeared that there were between two hundred and sixty and three hundred voters in the town. Verdict for the plaintiff, subject to the opinion of the court.

J. Appleton, for the defendants.

Rogers and W. P. Fessenden, contra.

By Court, WESTON, C. J. It was the duty of the town clerk to record the doings and proceedings of the town. And if through inadvertency or misapprehension, the record has been defectively made, it is competent for him while in office to complete it, by amending it according to the truth. He acts at his peril, and will be liable, if he falsifies or mistakes what it is his duty to record. *Welles et al. v. Battelle et al.*, 11 Mass. 477, is a case exactly in point. The town clerk testified, that the record is true as amended, which, at least until impeached, must have been presumed without his testimony.

The principal question presented to our consideration is, whether the town are bound and concluded, by the proceedings of the meeting held on the fifteenth of January, 1834. In all measures, in regard to which towns are authorized to act, at all legal meetings the doings of the majority present bind, not only the minority, but all who are absent. But the exercise of this power is subject to certain regulations, intended to afford full and fair opportunity to every citizen to be present, and to take part in any business, by which the interest of the town may be affected. Thus public notice is required to be given in a certain manner, and for a certain number of days, of the time and place of meeting, and of the subjects to be acted upon. When a meeting is fairly organized, it doubtless possesses the incidental power of adjournment to a future time. We do not say that they may not have the right to adjourn to another place. But there should be limitations to the exercise of such

discretion. It could not be tolerated that a few persons, by concert or otherwise, should be permitted to attend at the precise time appointed, and forthwith adjourn from a central to an extreme part of the town. In the case before us, the meeting called was never held at the place appointed. It was to be at the school-house, which must be understood to mean within its walls. If the adjournment from the usual place of holding town meetings to a distant point on one side of the town, could under any circumstances be proper, about which we give no opinion, it was a measure, which could be taken only at a regular meeting, to the validity of which, place, as well as time, is undoubtedly essential.

This case is as strong as any one that could be selected, to illustrate the necessity of maintaining this principle. The meeting was appointed at one. In half an hour from that time, half a dozen persons, one of whom is the town clerk, appear in the street. The town clerk reads the warrant; and they there vote forthwith to appear at a distant place, to which they immediately repair. Other citizens attend at the place first appointed, with a view to take part in the business, and finding no trace of a meeting, return home. They had no means of knowing that it was then going on at Patten's store. We can not but regard it in the highest degree dangerous to the rights of towns to hold them concluded by such a cause of proceeding. It is most manifest, that the citizens of the town were thus deprived of the privilege of being present at the transaction of important business, affecting their interests. A measure was taken, which a large majority disapproved. This is demonstrated by the proceedings of a subsequent meeting. Why should the small number at Patten's store bind the town? The only reason that could be assigned is, that every citizen had notice, and might have attended there, if he had been so disposed. But this is not true in fact. There is no reason to believe, that one tenth part of the citizens ever heard of the meeting at the store, until it was over.

We are aware of no legal reason, why the town should not be permitted to sustain their objections, by the testimony they introduced. It does not contradict the record. From that it appears that no meeting was held at the place appointed, but that an irregular one was held at a different place; and the testimony objected to shows, what otherwise might have been presumed, that many citizens were thereby deprived of the opportunity of being present, and taking part in their own concerns.

It is contended, that the validity of the proceedings at Patten's store, is recognized by the regular meeting in February, when the town voted to reconsider certain votes taken and recorded in January. But we are of opinion, that no such inference can fairly be drawn from that vote. It was the mode they adopted of expressing their disapprobation of the course previously pursued. To hold that the former doings were thereby ratified, would be to deduce a meaning from their vote, in direct opposition to their intentions. The previous doings did not bind the town. It should have been one of the articles in the warrant for a regular meeting, to see whether the town would ratify those doings, and an affirmative vote had thereon, before they could be confirmed, so as to be binding on the town: Stat. of 1821, c. 114, regulating town meetings, sec. 5.

It is urged, that prior to the amendment of the record, the plaintiffs had reason to believe that the committee of the town were clothed with sufficient authority, and that being in no fault, the town should be precluded from denying their authority. If the clerk makes an erroneous record, the town are not bound by it, merely because others confide in its correctness. They are notwithstanding entitled to have it set right. Otherwise they would be concluded, not only by their own votes, but by whatever, by design or accident, might be improperly entered by the clerk, and that without any chance of relief by amendment. The plaintiffs made their contract with certain persons, assuming to be agents of the town. Their remedy is against the agents, if they acted without authority.

The opinion of the court is, that the action is not supported; and the verdict is accordingly set aside.

Plaintiffs nonsuit.

TOWN MEETING, manner of calling and legality of: *Ford v. Clough*, 23 Am. Dec. 513.

CUTTS v. GORDON.

[13 MAINE, 474.]

IN ASSUMPSIT AGAINST SEVERAL DEFENDANTS, a promise by all must be proved.

IDEM.—An exception is made where one of the defendants is an infant; he may plead his infancy and a recovery be had against the other defendants.

ASSUMPSIT against three defendants. One was defaulted; the other two pleaded the general issue, and that Haskell, one of

them, was a minor. Evidence proving Haskell was a minor was given, and a verdict was directed to be found for the defendants, contrary to the instructions requested by the plaintiff.

J. Appleton and S. H. Blake, for the plaintiff.

J. B. Hill, *contra*.

By Court, *WESTON*, C. J. It is a well-established principle in the English law, that in assumpsit, where too many defendants are joined, the plaintiff must fail in his action, though he prove an express or implied promise against some of them; and that the objection can not be removed by discontinuing or entering a *nolle prosequi*, as to such as ought not to have been joined. And the same rule has been recognized by this court in *Redington v. Farrar et al.*, 5 Greenl. 379. There is, however, an exception to the rule, which is thus laid down by Sergeant Williams in note (2) to *Salmon v. Smith*, 1 Saund. 207: "If, in such actions, the defendants sever in their pleas, as where one pleads some plea, which goes to his personal discharge, such as bankruptcy and the like, and not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others." But it has been ruled at *nisi prius*, in two English cases, *Chandler v. Parkes*, 3 Esp. 76, and *Jaffray v. Freebain*, 5 Id. 47, cited for the defendants, that a plea of infancy is not within the exception. In *Gibbs v. Merrill*, 3 Taunt. 307, the court seem to incline to the same opinion. But in *Burgess v. Merrill*, 4 Id. 468, which turned upon the same facts, Mansfield, C. J., by whom the judgment of the court was delivered, says, no cases are found decided by the courts, upon consideration, upon this point. He then adverts to the two *nisi prius* cases, and decides that the action may be brought against the adult contractor only, overlooking the promise of the infant, which he considers as void.

But we have cases upon this point in this country, where the contract of an infant is regarded, not to be void but voidable, settled upon consideration. In *Hartness v. Thompson*, 5 Johns. 160, the court held, that where one of several defendants, in an action of assumpsit, pleads infancy, or gives it in evidence at the trial under the general issue, the jury may find a verdict for the infant, and proceed to judgment against the others. The same question was presented to the supreme court in Massachusetts, very soon after our separation; when the opinion of that court is to be regarded as high evidence of the law of both states: *Woodward v. Newhall et al.*, 1 Pick. 500.

Parker, C. J., speaking for the court in that case, goes into an examination of the English authorities; and he holds, that neither reason, justice, nor principle requires that the plaintiff should be turned round to a new action, where the objection of infancy is interposed by one of the defendants. The chief justice refers to the case of *Tappan et al. v. Abbot et al.*, decided to the same effect by that court, before the separation; and he cites with approbation the New York case, before referred to.

In *Tuttle v. Cooper*, 10 Pick. 281, Shaw, C. J., after citing the English *nisi prius* cases, says, a different rule has been adopted in New York and in Massachusetts, as an exception however to the more general rule, which is recognized in both states, in conformity with the English practice.

The case of infancy appears to us to fall within the reason of the exception, as much as that of bankruptcy. It secures to the infant the full enjoyment of his privilege. The objection is purely technical. If Lord Kenyon and Lord Ellenborough, distinguished as they were among English jurists, have unnecessarily narrowed the exception, we are under no obligation to follow their example. The common law of both countries is derived from the same source. But the evidence of what it is, which is authoritative here, is to be found in our own judicial decisions. It should be remembered, that every member of the court, by whom the judgment in *Woodward v. Newhall* was pronounced, had been called to the bench, many years before the erection of Maine into a separate state. If not then our court, it had been a short time before. The law of both states was the same. If we hold the law to be otherwise here, it must be because we are satisfied it was erroneously declared in Massachusetts. But appreciating as we do the reasons, upon which that decision was founded, and sanctioned as it is, by the authority of the supreme court of New York, we are of opinion, that it should be regarded also as the law of this state.

It is insisted, that if the action may be sustained against other defendants, the plaintiff should be holden at once to discontinue, or enter a *nolle prosequi* against the infant, as soon as the defense of infancy is set up; but if he elects to try that question, and it is found against him, it shall defeat the whole action. It is the province of the jury to pass upon the facts in controversy, and of the court, to enter such judgment, as is warranted by their verdict. In general in assumpsit, if they

find one defendant did not promise, no judgment can be rendered against either. But if they find, that one defendant made no binding promise, by reason of infancy, this forms an exception to that rule, and the promise of the others remains notwithstanding binding upon them. Why should the plaintiff be precluded from trying that question? The protection of the infant does not require it. A *nolle prosequi* is justified and entered, because the objection of infancy is admitted. If tried, the fact is found. In either case, it appears from the record, why judgment is entered for one defendant for his costs, and in favor of the plaintiff against the others. The proof must conform to the declaration; but the plaintiff is not required to prove all that he avers. If one defendant escapes on the ground of infancy, the plaintiff is entitled to judgment, if he proves the alleged promise made by the other defendants. Of this opinion were the supreme court of New York; and we perceive no sufficient reason to question its correctness.

Upon the whole, the judgment of the court is, that the presiding judge of the common pleas should have instructed the jury, as requested, that they might find for the infant defendant, and for the plaintiff against the other defendant.

Exceptions sustained.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

SELLMAN v. BOWEN.

[8 GILL & JOHNSON, 50.]

DECISION OF QUESTION IN ISSUE ON TRIAL AT LAW is conclusive as between the same parties, in a subsequent proceeding in equity, wherein the same issue is raised.

GENERAL REPUTATION, COHABITATION, AND ACKNOWLEDGMENT ARE SUFFICIENT EVIDENCE OF MARRIAGE in all cases except in actions for criminal conversation, and in prosecutions for bigamy, and are, therefore, sufficient in cases of dower.

COURT OF EQUITY IS THE ONLY FORUM IN WHICH WIDOW CAN RECOVER from the alienage of her husband damages for the detention of her dower.

RECOVERY AT LAW, BY WIDOW, OF DOWER, does not preclude her from afterwards recovering the rents and profits in equity.

STATUTE OF LIMITATIONS DOES NOT BAR WIDOW'S RIGHT *as* DOWER, and can not therefore bar her right to recover the rents and profits, although the latter are sought in a separate suit.

RENTS AND PROFITS ARE DECREED, IN SUCH CASE, from the time of demand made, and are estimated according to the improved value of the premises from the time the improvements were made.

BILL in chancery, brought by the appellant to recover from the appellee a portion of the rents and profits of a lot in the city of Baltimore, of which the appellant's late husband was seised during the coverture. The chancellor dismissed complainant's bill, with costs, and she appealed to this court. The other facts sufficiently appear from the opinion.

Glenn and Speed, for the appellant.

Randall, for the appellee.

By Court, **ARCHER, J.** The complainant having recovered

her dower at law, seeks by this bill the rents and profits from the death of her husband. The seisin of the husband is denied; and the defendant puts the complainant to the proof, not only of the seisin, but the marriage.

The complainant anterior to the filing of this bill to recover rents and profits, had instituted suit in Baltimore county court, for her dower. In this suit the seisin of the husband was directly in issue, and the marriage by not being denied, was admitted. The verdict and judgment in that cause being between the same parties, where the same issue was in controversy, must at all events, as to the seisin, be considered in this controversy as conclusive; and as the demandant in the suit at law, could not have recovered without proof of marriage, or its admission, the effect of the record perhaps, ought to be considered as equally conclusive of the marriage as the seisin; the marriage not having been denied, but the cause being put to the jury on the issue of seisin. But without proceeding to any determination upon this branch of the subject, the proof of marriage in the record before us is abundant, if general reputation, cohabitation, and acknowledgment, can in such a case be considered as evidence, and of this we have no doubt. Such evidence is sufficient in all cases, except in actions for criminal conversation, and in prosecutions for bigamy: *Morris v. Miller*, 1 Wm. Bl. 632.

In ordinary applications to equity for a decree for dower, and rents and profits, when the seisin of the husband is denied, it is the course of this court to send the parties to law, to litigate the legal question, while in the mean time they retain the bill. Between these parties, however, before the filing of this bill, the legal right had been tried and settled, and every question had been adjudicated by a court of common law, which in any shape the cause could assume, would fall within their peculiar cognizance.

The complainant therefore meets with but three difficulties in addition to those above adverted to, in the recovery of the rents and profits which have been withheld from her.

1. It is supposed that having sued for her dower at law, she might there have recovered her damages, and having failed to recover them at law, she has lost them everywhere. If there exist a right to recover damages at law, and the plaintiff at law failed to recover them, looking to the state of the record, it is probable that the matter must be considered as *res adjudicata*, and that it can not form the subject of a new litigation, but the

judgment already passed has foreclosed the plaintiff. It must be conceded that in the case of *Steiger and Hillen*, 5 Gill & J. 183, countenance is given to the doctrine that at law, the widow may recover from an alienee of the husband her damages. The suggestion was not necessary to the determination of that case, and having been fully discussed in this case, and the doctrine more deliberately examined, we have brought our minds to the conclusion, that it is only in a court of equity that the rule will apply, that a widow is entitled to her damages from the alienee of her husband, and that consequently, a court of equity is the only and peculiar forum for their recovery in such a case. The following authorities would appear conclusively to establish the doctrine: Doctor and Student, 140, 141; Roper on Prop. 435, 443; 2 Johns. 119;¹ Jenk. Cent., 1 Ch. 85; Park. on Dower, 391.

2. That the rents and profits are but incidents of the right to dower, and the dower having been recovered at law, the bill for the incidents can not be maintained without having the support which they would derive from an application at the same time for the principal. If it be true that the widow could not have recovered them at law in this case, and that for the dower itself, courts at law and equity have concurrent jurisdiction, the result of such a principle, would in all cases be to defeat the widow of her damages, where she pursues her remedy at law; and such a doctrine would be attended with this further result, that in all such cases the jurisdiction of the courts of law, of the principal (the dower) would be practically ousted, for no one would ever go to law to recover her claim to dower, when she is to be pursued with the inevitable penalty of a loss of rents and profits. An argument leading to such consequences can not be maintained. Besides the respondent, who is the recipient of the rents and profits, of that which in fact belonged to the wife, ought to be and is considered in the mind of the court of equity, as a trustee, or bailiff, and accountable for his stewardship, and it can not be perceived how, with any legal propriety, the compulsory recovery of the principal which has been unjustly withheld, should produce the effect of stripping the defendant of his character of trustee, with which he had been clothed, in order to enable a court of equity to do justice, when the same reason precisely ought to continue after the recovery of dower as before. A widow may expressly, or by implication, waive her right to rents and profits, but certainly

1. *Embree v. Elins*.

a recovery at law to the extent to which she could recover, can not be considered as waiver of anything.

8. It is supposed that the complainant is barred by limitations. Had she pursued her claim, both for dower, and for rents and profits, in a court of equity, she would not have been barred, and we understand this to have been conceded in the argument. But if it were not conceded, it is established by authority. Meane profits as damages, are given at law under the statute of Merton, without restriction as to time, and when they are decreed in equity to the widow, the like account will be taken; courts of equity applying limitations only, in analogy to limitations at law: Roper on Prop. 448. In 9 Ves. 222,¹ after the lapse of twelve years, rents and profits were decreed, the master of the rolls observing, that there was no reason for depriving her of the account, if she was not barred at law.

Shall then the circumstance of her having sued at law for her dower, and in equity afterwards for her rents and profits, make any difference in this respect? We think not. The character of the claim, and all the legal principles which might go to support or defeat it, remain unchanged, and ought to be applied to it, when presented to the court in this isolated shape, as would attach to it when combined with a claim for dower.

The decree of the chancellor is reversed with costs, and this court, when an account shall be prepared by an auditor to be appointed by this court, will decree rents and profits from the time of the demand proven in the cause; which rents and profits are to be estimated according to the improved value of the premises, from the time the improvements were made.

Decree reversed with costs in both courts.

REPUTATION AND COHABITATION AS EVIDENCE OF MARRIAGE: See *Holmes v. Holmes*, 26 Am. Dec. 482, and note 484, where the other cases relating to this subject, reported in this series, are collected. The principal case is cited in *Boone v. Furnell*, 28 Md. 628, and in *Redgrave v. Redgrave*, 38 Id. 97, to the point that reputation, cohabitation, and acknowledgment are sufficient evidence of marriage.

DOWER IS NOT WITHIN THE STATUTE OF LIMITATIONS: See *Barnard v. Edwards*, 17 Am. Dec. 403; but see note to *Hitchcock v. Harrington*, 5 Id. 237.

1. *Oliver v. Richardson*.

MARYLAND SAVINGS INSTITUTION *v.* SCHROEDER.

[8 GILL & JOHNSON, 93.]

APPLICATION TO A COURT OF EQUITY FOR THE EXERCISE OF ITS PROHIBITORY POWER must come recommended by the dictates of conscience, and be sanctioned by the clearest principles of justice; and where a party has converted his deposits in a savings institution into stock of the company, and has, by reason of such conversion, received increased dividends, he will not, on the ground that the conversion was unlawful, be granted an injunction to prevent the officers of the corporation from paying the special depositors thereof, or receiving their certificates of deposit in payment of debts due to the institution, it having become insolvent.

FUND ARISING FROM CONVERSION OF THE DEPOSITS INTO STOCK, by the depositors, with their own consent, is in the hands of the corporation as trustee for the special depositors as creditors of the institution, who became such on the faith of it; and a court of equity will not interpose to withdraw such fund from the destination to which it has been thus solemnly pledged.

COURT, IN DETERMINING WHETHER INJUNCTION SHOULD ISSUE IN SUCH CASE, will not consider the question whether or not the corporation, under its charter, had power to make the conversion of deposits into stock.

APPEAL from order of court of chancery granting an injunction on bill and answer. John Schroeder filed his bill, in which he charged that the Maryland savings institution was by act of the general assembly made a body politic, with power to receive deposits, provide for the admission of members, and for the investment of its funds; that in every year the directors were to make a dividend of the profits and pay the same to the depositors; that the corporation was prohibited from doing any act inconsistent with the privileges secured to the existing banking institutions of the state; that complainant became a weekly depositor, and so continued until he received a circular from the treasurer of the institution requiring him to discontinue depositing, at which time his deposits amounted to five hundred and twenty dollars; that the depositors, upon receiving this circular, submitted to the proposition contained in the resolution set forth in it, to change the original character of their deposits; that they did not do so of their own free will, but in consequence of the penalty attached by the resolution to a non-compliance therewith; that they did not thereby intend to relinquish their character and claims as depositors; that said resolution was void; that the certificates issued by the corporation bearing interest are void, and made to enable the com-

pany to use banking privileges contrary to its charter; that it did in fact assume banking powers in discounting notes and circulating bank paper; that complainant never became a member of the corporation; that the corporation is insolvent, and has suspended payment; that complainant is a depositor, and claims to be entitled to his deposit, either to the exclusion of the holders of the certificates of special deposit or in common with them, which right the corporation denies; that the directors of the corporation are solely engaged in settling up its affairs, and in distributing the effects held by it which belong to its depositors, and that they are continually giving unjust preferences; that they are intending to pay, as far as possible, the whole amount of the special deposits whereby all the funds and effects will be exhausted, to complainant's irreparable injury. The prayer was for a summons to the company, an answer to the bill, an injunction, and general relief. To the bill were annexed certain documents, among which was a copy of a resolution of the directors of May, 1831, which provided that the weekly depositors should terminate their deposits with the then current month; and that they should be notified that after the first day of the next December their deposits should cease to bear interest or be entitled to a dividend of the profits, unless they were in the mean time converted into permanent stock of the institution in conformity to the by-law, a copy of which was also annexed to the bill, and by which it was provided that weekly depositors might make a permanent investment of their deposits in stock of the corporation.

On the filing of the bill the chancellor ordered the application for an injunction to stand for hearing, and that a copy of the bill be served upon each of the defendants before the day set for such hearing. The defendants answered, alleging that the directors did pass the resolution and by-law exhibited with the bill; that the plaintiff consented to convert his weekly deposit fund into capital stock, and did so of his own free will, and in writing; that the conversion of weekly deposits into capital stock was not made to conceal any fraud practiced upon the rights of depositors, or to exercise banking powers; that this conversion was generally and notoriously accomplished, and a large business transacted by the institution on that basis; that complainant knew that special deposits were so taken, and that he had received increased dividends. They denied that the institution was insolvent as to creditors; that they had re-

ceived special deposits in any other way than as payment for debts due, or that they had given improper preferences. The defendants also exhibited with their answer, the following document signed by the complainant: "The undersigned weekly depositor in the Maryland savings institution, do hereby agree and request, that five hundred and twenty dollars of my present deposit in the said institution may be converted to and vested permanently in twenty shares of stock of the Maryland savings institution, in my name. Given under my hand the twenty-eighth June, 1831. John Schroeder." Subsequently, the complainant, with several other stockholders of the institution, filed an amended bill, which was answered by the defendants, but the allegations therein contained are not necessary to an understanding of the decision. On the third of February, 1835, the chancellor ordered a writ of injunction to issue directed to the Maryland savings institution, commanding it to refrain absolutely from paying away any money belonging to it, except for the purposes of collecting or preserving effects belonging to it; and to safely keep and hold the same until the final hearing of the case, or the further order of the court. From this order the defendants prayed an appeal.

Stewart and Mayer, for the appellant.

Johnson and Campbell, for the appellee.

By Court, STEPHEN, J. In deciding upon the question presented by the appeal to this court for adjudication, we do not deem it necessary to form or express an opinion relative to the power of the corporation under its charter to make the conversion of the appellee's deposits into stock, because we think, that the decision of the court below awarding the injunction is unsustainable upon other grounds, and is in conflict with the soundest principles of equity jurisprudence. An application to a court of chancery in a case like this, for the exercise of its prohibiting powers, or restrictive energies, must come recommended by the dictates of conscience, and be sanctioned by the clearest principles of justice. We are told by Mr. Maddox, in his treatise on the principles and practice of the court of chancery, in vol. 1, 104, that an injunction is a prohibitory writ, specially prayed for by a bill in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than criminal acts), which appears to be against equity or conscience. This being the character of the writ and the grounds upon which it ordinarily issues, it becomes neces-

sary to inquire whether the granting of it in this case was calculated to subserve the purposes of justice, and to prevent the commission or doing of an act against the principles of equity and conscience. We think that an attentive examination of the prominent features and circumstances of this case, will leave but little doubt as to the conclusion proper to be drawn as the result of such an inquiry. So far from the complainant having a right to the relief which he asked at the hands of the court of chancery, we think that there is not any ground of equity in his case, and that his conscience is bound by an equitable estoppel, if not from questioning the right of the corporation to make the conversion of his weekly deposits into capital stock, as a fund for the payment of its debts, at least it is so bound from making any attempt, to shield the fund so created from a liability to the payment of debts contracted with the institution upon the faith of its responsibility; and more especially as it clearly appears, his interest has been essentially promoted in the shape of dividends by the credit attracted to the institution, in consequence of such conversion.

It would not certainly comport with the principles of equity and fair dealing, to permit the appellee to hold out false colors to the world, and by attracting the public confidence to the institution, to realize to himself large profits in the form of dividends on his stock, pledged as a security to the creditors of the corporation, and then to call in aid the powers of a court of equity to protect his interest in said stock from a liability, to which he had voluntarily subjected it; and by which liability he and his associates had been essentially benefited. We say voluntarily subjected it, because the allegations of the bill to the contrary, are in this respect flatly and pointedly contradicted by the answer. It must be borne in mind, that the order for an injunction from which this appeal has been taken, was granted by the chancellor, not upon the case alone as made by the bill, but upon the bill and answer as well of the corporation or body politic under its corporate seal, as of the president and directors in their private and individual capacities under oath. If therefore the injunction is to be sustained, it must be upon the case as made by the bill and answer, and not by the bill alone. The object of the injunction appears to have been, and its effect and operation are, to prevent the officers of the corporation from paying the special depositors, or receiving their certificates of deposits in payment of debts due to the institution. How far it is war-

ranted by the principles of equity and conscience in such its operation upon their rights and interest, it is the duty of this court now to examine and declare, and we think that in a court of conscience at least, but little doubt can be entertained upon the subject. It is an unyielding and inflexible principle of the court of chancery, that he who seeks equity ought to be prepared to do equity. Before, therefore, the complainant can enlist the countenance of a court of equity in his favor, he must be prepared to render to these depositors that full measure of justice which the principles of equity and conscience demand at his hand. Does his standing before this court, and the relief which he prays in his bill, exhibit him in that character and attitude? We think it does not, and that the injunction which issued in this case ought not to have been granted. Numerous cases analogous in point of principle to the one now before this court, may be extracted from the books of equity decisions. They are all decided upon the ground of fraud and imposition, and are intended to uphold and enforce the principles of good faith and fair dealing in the transactions and intercourse of man with man.

A striking and impressive illustration of this doctrine of the court of equity upon such subjects, may be found in 2 Atk. 72,¹ where Lord Hardwicke, that great luminary of the court of chancery, says, there are several instances where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his rights, and the person building had no notice of the other's rights from which the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance. Speaking of the same rule of equity, Chancellor Kent, in 6 Johns. Ch. 168,² says, where one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration by a person pretending to title, and having color of title, he shall be bound by that disposition of the property, and especially if he encouraged the parties to deal with each other in such sale and purchase. It is deemed an act of fraud for a party conusant all the time of his own right to suffer another party ignorant of that right to go on under that ignorance, and purchase the property or expend money in making improvements upon it.

In 1 Johns. Ch. 354,³ Chancellor Kent, speaking upon the

1. *East India Co. v. Vincent*, 2 Atk. 83.

2. *Storrs v. Barker*; 8 C., 10 Am. Dec. 314.

3. *Wendell v. Van Rensselaer*.

same subject, says, there is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.

We think that the principle established by these decisions has a considerable bearing upon the merits of this case. The appellee, after having consented that his deposits should be converted into stock, as a fund or security for the debts of the institution, and after having encouraged their special depositors to deal with the institution upon the faith of such responsibility, now endeavors to withdraw the fund from the pledge and liability to which he had voluntarily subjected it; and claims to stand in a court of equity upon an equal footing with them in the teeth of such, his solemn engagement to the contrary. We think, in the language of the authority just referred to, that it would be an act of fraud and injustice in him; that his conscience is bound by an equitable estoppel.

Whether the corporation had a right to make the conversion against his will and consent, under the powers derived from their charter, it is not necessary now to decide; nor do the merits of this controversy depend upon the solution of that question. The agreement to convert is to be received as a contract with each depositor, who trusted his money to the corporation upon the faith of it, that his stock should be liable to such depositor as a fund for the payment and satisfaction of his claim. To such purpose the stock of the appellee must be considered as voluntarily dedicated by him; and it would we think, be repugnant to the soundest principles of equity and justice to sanction the attempt which is now made, to wrest it from the destination and purpose for which it stands pledged by his own solemn engagement, and thereby inflict a most serious injury upon those whose only fault has been a misplaced confidence in the sincerity and inviolability of his promises and professions. To such an attempt, we think that a court of chancery in the exercise of its equity powers ought to lend no assistance; and that such a suitor should be turned from its doors to seek redress anywhere rather than in a court of conscience. Why is it that a court of equity decrees the specific

execution of a parol agreement on the ground of part performance, and notwithstanding the express provisions of the statute? It is on the ground of fraud in refusing to perform after performance by the other party, and to prevent the statute from being an engine of that fraud, which it was the object and policy of its enactment to prevent. Upon the whole we are clearly of opinion, that whether the corporation had the right to convert the weekly deposits into capital stock or not, still we think that the injunction under the circumstances of this case should not have been granted, and that the order granting the same ought to be reversed. We consider the fund arising from this conversion of the weekly deposits into stock by the depositors with their own consent, to be in the hands of the corporation as trustees for the special depositors as creditors of the institution, they having become such upon the faith of it, and that a court of equity ought not to interpose to withdraw it from the destination to which it has been thus solemnly pledged.

Order reversed.

Cited in *Cole v. Cole*, 41 Md. 304, to the point that equity will not permit the statute of frauds to be made an engine of fraud.

ZEIGLER v. SENTZNER.

[8 GILL & JOHNSON, 150.]

COURT OF EQUITY WILL NOT ASSUME JURISDICTION OVER A CONTRACT merely because it relates to good-will; and a bill claiming damages for the violation of such a contract, when ample and appropriate redress can be found in a court of law, will not be sustained by this court.

APPEAL from the court of chancery. The bill filed by the appellee charged that the complainant's father, at and prior to the time of his death, rented and obtained from the mayor and city council of Baltimore the right to use and occupy certain stands in that city for the purpose of vending meats; that he died possessed of the rights and privileges attached thereto, among which were the rights of pre-emption and good-will; that these rights had descended to complainant, and were of great value; that on the death of complainant's father, complainant being then an infant, his uncle was about to renew licenses for said stands in the name and for the use of complainant, when John L. Zeigler applied to the administratrix of complainant's father, and to his said uncle, for permission to enter upon said stands

as trustee for the use of complainant, and promised that if such permission were granted, he would faithfully execute the trust, and account to the complainant, when he came of age, for the rents and profits; that they consented, and he entered and took possession of said stands; that complainant is now of full age, and the defendant has refused to account with him. The prayer was for an account and general relief. Zeigler's answer alleged that the renting of the stalls was from year to year; that complainant's father was indebted to him, and that he had not been paid; that the right of pre-emption and good-will did not descend to complainant; that the renting was at the discretion of the mayor and city council, who refused to renew when the rent was in arrear. It denied that there was any contract or agreement for the benefit of the complainant touching the stands, and asserted that defendant acted on his own sole account. Evidence was taken, and an account stated, upon which the chancellor passed a final decree ordering the defendant to bring into court to be paid to the complainant the sum of one thousand five hundred and sixty-five dollars, with interest and costs. The defendant appealed.

Mayer and Johnson, for the appellant.

Speed and Scott, for the appellee.

By Court, CHAMBERS, J. The bill in this case does not claim a specific performance of the contract charged. That is impossible, inasmuch as the defendant, now the appellant, has not and never had the title to the property or thing in relation to which, or to the rights attached to it, the contract is said to have been made.

It can not be sustained as claiming an account for property belonging to an infant, upon which the appellant entered, thereby making himself liable as guardian, because the title to the property occupied never was in the complainant.

Fraud is not alleged in the bill, nor does it profess to be a bill for a disclosure. We have not been able to discover to which head of chancery jurisdiction we are to refer for the authority to grant the relief claimed in this bill.

The argument for the appellee seems to assume, that there is something in the character of what is termed in the bill "good-will," to vest such jurisdiction in regard to a contract for the sale of it. In *Cruthwell v. Lye*, 17 Ves. 835, good-will is defined to be, "the probability that the old customers will resort to the old place," and considering this to be what is intended here,

we perceive nothing in its character requiring us to adopt such a doctrine upon principle. A careful examination of the cases referred to, and others, has not resulted in finding any decision, asserting that courts of equity will assume jurisdiction over contracts because they relate to good-will. They countenance rather the contrary opinion: 1 Chit. Gen. Prac. 858, 859, and the cases there cited.

For the purpose of the argument we will concede the utmost, which the complainant, the appellee, here can claim, that good-will is as much the proper subject of contract and sale as another vendible property; that the contract of sale is distinctly and sufficiently alleged in the bill and proved by the testimony; yet we think this must be considered a bill claiming damages for the violation of a contract, the appropriate and ample redress for which is to be found in a court of law, at the hands of a jury.

With this view of the case, it is unnecessary to enter into a minute examination of the facts as alleged, or to attempt a reconciliation of the testimony.

If a valid contract has been made, and can be established to entitle the appellee to recover for its violation, his remedy is at law, not in equity; if no such contract can be established, he can have no ground of claim before either tribunal.

The decree in this case is accordingly to be reversed, and the bill dismissed; but under all the circumstances of the case without costs. The court will sign a decree accordingly; and also an order directing the money deposited by the appellant to be repaid to him.

Decree reversed.

GOOD-WILL OF A NEWSPAPER MAY BE PROTECTED from deception and piracy, but not from the competition of a rival: *Snowden v. Noah*, 14 Am. Dec. 547.

ALLEGRE'S ADM'RS v. MARYLAND INS. CO.

[8 GILL & JOHNSON, 190.]

INSURED, BY HAVING INSERTED IN THE POLICY THE WORDS "WITH LIBERTY OF" A CERTAIN PORT, does not necessarily notify the insurer that the object of the privilege is to trade at that port; and procuring such words to be inserted is not an unequivocal intimation of the nature of the cargo insured; nor is it an intimation to the underwriters that the assured looks to such port, under any circumstances, in the contemplation of the parties, as that at which the voyage is designed to terminate.

ASSURED, WHEN DEMANDING INSURANCE ON LIVE STOCK, MUST NOTIFY the assurer of the nature of the cargo; and his failure to do so vitiates the policy.

COVENANT on a policy of insurance on a brig and cargo, at and from Rio de la Plata to Havana, with liberty of Martinico. The cargo with which the brig sailed consisted exclusively of live stock; and before she reached Martinico she encountered severe weather, which killed the principal part of the stock, and forced her to repair to Rio de Janeiro, where she was condemned as unworthy of repairs, and with the remnant of the live stock sold for account of whom it might concern. The cargo was regularly abandoned. There was evidence to show that the principal trade from Rio de la Plata to Havana was in beef; of a trade exclusively in mules and jackasses from Rio de la Plata to Martinico; and proof of mules, etc., being occasionally shipped from Rio to Havana, with jerked beef. There was also proof of a usage among underwriters in Baltimore to consider that the words liberty of a place, in a policy of insurance, gave liberty to trade. There was also evidence of a prevailing practice to use Martinico for the purpose of procuring a clearance from that port for Havana. The court charged the jury that the plaintiff could not recover, because he had not shown either an exclusive direct trade in live stock from Rio de la Plata to Havana, nor an exclusive indirect trade from Rio de la Plata by Martinico to Havana. The plaintiff excepted to this charge; and the verdict and judgment being against him, appealed to this court. This case was before the court on two former occasions, and is reported in 6 Har. & J. 408 [14 Am. Dec. 289], and in 2 Gill & J. 136 [20 Am. Dec. 424], from the opinions and statements in which a fuller knowledge of the facts may be obtained.

Mayer and Glenn, for the appellant.

Stewart and Merideth, for the appellee.

By Court, DORSEY, J. The only question discussed in this cause arose as to the effect of the words in the policy, "with liberty of Martinico." With liberty of a port, is a power subordinate to the general course of the voyage.

It does not necessarily import an intention to trade. It may, and ordinarily is granted for other and different purposes. It is not an assurance or intimation to the underwriters, that the assured looked to the port of privilege, under any circumstances, in the contemplation of the parties, as that, at which, the voyage

was designed to terminate. Mere awakening circumstances, inciting the assurer to inquiry, are not sufficient to relieve the assured from the necessity of making known to the insurer, the fact that the cargo for insurance consisted of live stock; as was in effect decided in the case of *Allegre's Adm'rs v. The Maryland Ins. Co.*, 2 Gill & J. 136 [20 Am. Dec. 424]. A knowledge of this fact previous to the execution of the policy must be shown in the underwriter; or an imputed knowledge by proving that on the voyage insured live stock is the only article of commerce. But it is insisted that a knowledge of the nature of the cargo must be imputed to the underwriters because they gave the assured the liberty of Martinico, which confers the license to trade there. This position can not be sustained. It rests on a principle of false logic universally exploded. It draws a general conclusion from an isolated fact. The grant of a license conferring a power to do a variety of acts, does not necessarily imply the commission of all the acts authorized. Had the design of the assured been to call at Martinico for a clearance, or to obtain supplies necessary to the prosecution of the voyage, or to do any act, or transact at Martinico any business, wholly unconnected with the trade carried on between La Plata and Martinico, the license in such case required, and that in this case granted, would have been identically the same. In requiring the liberty of Martinico, the insured did not necessarily notify the insurer, that the object of the privilege was to trade at Martinico, and was not therefore an unequivocal intimation of the nature of the cargo. And if we advert to the circumstances attending this insurance, so far from their intimating to the assurers that the cargo was of live stock, the reverse was the natural conclusion to have been drawn from them.

According to the decision of this court in the case in 2 Gill & J. 136, when insurance is demanded on live stock, it is the duty of the assured to notify the assurers of the nature of the cargo, and his failure to do so vitiates the policy. Of this principle of the law of insurance, the underwriters in this case must be presumed to have had knowledge. From the order for insurance, apart from the liberty of Martinico, the necessary inference was, that the thing insured was a dead cargo, and giving to the order of insurance and policy a fair and reasonable legal construction, this inference is not controlled by the privilege granted as to Martinico. If the design of this liberty was, as has been urged, to terminate the voyage, and sell the whole cargo at Martinico, should the market prove

favorable, Martinico would have been made one of the *termini* of the voyage, and a proportionate return of premium would have been provided for in the event of the voyage terminating there. Such an omission was the strongest implied intimation that could be given, that the object of the assured in requiring the liberty of Martinico, was not that now ascribed to it in the argument, and there is nothing in the proof offered which would give to the policy a different interpretation from that, which on its face it purports to bear.

Judgment affirmed.

JENKINS v. WALTER.

[8 GILL & JOHNSON, 218.]

GUARDIAN WHO DEPOSITS IN HIS OWN NAME MONEY OF HIS WARD in a bank which subsequently fails, must bear the loss thereby occasioned, although the bank was at the time of the deposit sound, and the guardian then made on the certificate of deposit an indorsement that the money was the property of the ward.

APPEAL from the orphans' court of Baltimore county. The opinion states the case.

Stewart, for the appellant.

Scott, for the appellee.

By Court, STEPHEN, J. This is an appeal from an order of the orphans' court of Baltimore county, directing the defendant, James Jenkins, the late guardian of the appellee, to pay to him the sum of four hundred and ninety dollars and eighty-four cents with interest thereon, from the twenty-eighth March, 1836, until paid. A part of this sum was deposited in the bank of Maryland by the guardian of the appellee, on the day he received it from the executor on his ward's account; the bank at that time being in high credit and in prosperous circumstances. The deposit, however, was made and the certificate taken in his own name, and no communication was made to the bank at that time, that the money deposited was trust property. The bank was to pay for the money deposited an interest of five per centum per annum. On the certificate of deposit an indorsement was made, that the money deposited was the property of the appellee, but the fact of such indorsement was not at the time disclosed to the bank, and the appellant appeared upon the books of the institution to be the absolute proprietor of the sum deposited; and it does not

appear that in his settlements with the orphans' court he ever communicated to that tribunal, that in making the deposit he acted in his fiduciary capacity, until the failure of the bank took place, in the year 1834. In his second account settled with that court, it appears he charged himself with an interest of six per centum per annum, upon the amount of his ward's property in his hands, including the sum so as aforesaid deposited. Upon this state of facts the question arises, upon whom the loss arising from the failure of the bank is to fall? Is it to be borne by the ward, or ought the guardian to be held responsible for the consequences following from the ultimate insolvency of that institution?

According to the decision of the court below, the loss arising from that contingency is to be visited upon the appellant, and from that decision an appeal has been taken to this court for its revision, so that if erroneous the error may be corrected. Although in this transaction there may have been the most upright intention, and perfect good faith on the part of the guardian in making the deposit, still we are constrained to say, that we think the decision of the court below was correct, and that it ought to be affirmed. At the same time that this court feels itself bound to shield a trustee from harm, in the honest and faithful discharge of his duties in his fiduciary character, it is bound studiously to exercise a vigilant care in protecting the interests of those who, from their tender years, are incapable of protecting themselves. No principle seems to be better settled than that in such a case as this, any loss arising from a misplaced confidence in the solidity of a banking institution, or other depositories of trust property, must be borne by the trustee, and not by his *cestui que trust*. By making the deposit in his own name, he gained a credit with the bank, and reaped all the advantages which could be derived from the apparent ownership of the sum deposited, assuming his authority so to make such a deposit, and having received the benefit, the law declares, and justice seems to require, that he should bear the loss. Nor is there any peculiar hardship in the establishment of such a principle, which would deter a prudent trustee from assuming upon himself the responsibilities of such a fiduciary relation, as it is at all times in his power to avoid any risk or responsibility by clothing the transaction in its true colors, and making the deposit not in his own name, but in the name of him who is the real owner, and for whom he is trusted.

That such is the doctrine of a court of equity, we need only

refer to a case reported in 4 Madd. Ch.¹ That was a case of an agent who gratuitously undertook the collection of debts for certain trustees, which he deposited with a banker, then in good credit, but who ultimately failed; there, as here, the money was deposited in his own name, and upon interest, and the vice-chancellor in delivering the opinion of the court expressed himself in the following emphatic terms: "This may be a case of individual hardship, but the court is bound to proceed upon those principles which are deemed essential to the general interests of mankind. The defendant being the gratuitous agent of his sister's trustees, receives their money which he mixes with his own, by paying it into his own bankers and on his own general account. These bankers were in the habit of paying him an interest of three per cent. on the moneys in their hands. The defendant says he meant to give credit to the trustees for their proportion of the interest, but he never made any intimation to that effect. This money is partly lost by the failure of the bankers; and the question is, whether the defendant can throw this loss upon the trust. I will not say what might have been the effect if he had placed these moneys in the same bankers' hands, with full information of the trust and to a distinct trust account. It is sufficient to say, that here the defendant gave no notice to the bankers that any part of the moneys in their hands was trust property. Both he and they treated the money as wholly his own; and the bankers considered themselves as his agents solely. It is said that he gave notice to the trustees that he had so invested the money, and that they did not object to it, and are therefore to be considered as having authorized it. If he had given full notice with whom he had invested it, and that he had mixed it with his own moneys, and that an interest would be derived from it, there would have been great weight in that argument, but his letter of the twenty-sixth of January, 1816, only states that it is in bank, not stating with what banker, or that it is mixed with his own moneys, or that a profit is to be derived from it. The fact alleged by the defendant, that he had always a balance in his bankers' hands equal to the trust money, is in my view of the case immaterial. I consider the trust moneys thus mixed with his own, and placed in his bankers' hands, on his own general account, to be an employment of the trust money for his own advantage or his own

credit; and that he is therefore responsible for the loss which has resulted from it."

It is true this was the case of a gratuitous agency for trustees, but the principles upon which he was held responsible, would, we think, equally have applied if the deposit had been made by the trustees themselves, and a loss under similar circumstances had subsequently occurred. The reasoning of the court upon which the agent was held responsible, would equally have applied to his principals. The principle of the decision in 4 Maddox received the sanction of Lord Chancellor Eldon, in a case to be found reported in 11 Ves. 377.¹ That was the case of a receiver who was charged with a loss arising from a failure of a banker, to whom remittances had been made to his own credit and use; and not to a separate account for the trust. In that case the lord chancellor says, it would be most dangerous to let a receiver deal with the money as his own, until the time his accounts are to be passed, "and if any loss occurs, then to deal with it as the trust estate."

In the settlement of his second account with the orphans' court the appellant charged himself with the legal interest of six per centum, and not with the bank interest for which he had stipulated upon making the deposit. It is not readily perceived upon what ground this was done, unless he considered the deposit to have been made upon his own responsibility; and if prior to the failure of the bank, he had become insolvent, the credit which he obtained with the bank on his own account would have inured to the benefit of his creditors, and his ward must have sustained the loss. In the case above referred to in 11 Vesey the lord chancellor says, if he (the receiver) had failed before the failure of the bankers, this estate could never have claimed any part of the balance there, for it was carried to his own private credit, and there was nothing to prevent his paying any other debt with it; and although the claims of creditors upon the fund deposited might be defeated by the exhibition of the indorsement upon the certificate, showing on whose account the deposit was made, yet we think it clear, the bank would have had a right to appropriate the money so deposited to the satisfaction of any demand they might have had against the appellant. This may be a case of some hardship to the appellant, but in such a conflict of interest it is of less consequence that individual injury should be sustained, than that the wisdom and policy of established principles should be violated.

1. *Wren v. Kirton*.

Before closing this opinion, we wish it, however, to be distinctly understood, that we do not mean to decide that a guardian could protect himself from loss, by making the deposit in the name of his ward, without the sanction of the orphans' court, but mean to leave that question unaffected by any views herein expressed.

We therefore think that the decree of the orphans' court of Baltimore county was correct, and ought to be affirmed with costs.

Decree affirmed.

LIABILITY OF GUARDIAN: See *Konigmacher v. Kimmel*, 21 Am. Dec. 374, and note 381.

PA., DEL. AND MD. STEAM NAV. CO. v. DANDRIDGE.

[8 GILL & JOHNSON, 248.]

PLEADING CONSIDERATION.—A declaration which alleges that the defendant, in consideration of a certain sum to be paid to him by the plaintiff, promised to do certain things, for breach of which promise the action is brought, is bad after verdict, because it fails to allege any agreement between the parties, or any consideration for such promise by the defendant.

PARTY FOR WHOM SERVICES ARE TO BE PERFORMED under a contract is not bound to pay for them until they are rendered.

ALLEGATION OF TOTAL NEGLECT AND REFUSAL TO PERFORM an engagement, is not sustained by proof of a negligent and imperfect performance.

DECLARATION WHICH ALLEGES A CONTRACT TO TOW OUT A VESSEL and cargo safely, is not sustained by proof of a contract to tow out free from a particular description of danger.

DECLARATION WHICH MERELY DESCRIBES AS "GOODS, CHATTELS, WARES, AND MERCHANDISE," the cargo of a vessel, for the failure to tow out which safely the action is brought, does not contain a description sufficiently certain and definite.

EVIDENCE OF NEGLIGENT PERFORMANCE IS NOT ADMISSIBLE to support an issue of total neglect and refusal to perform.

QUESTION OF VARIANCE BETWEEN ALLEGATION AND PROOF can not be raised, for the first time, in this court, since the passage of the act of 1825.

AGENT OF CORPORATION DEFENDANT, WHO IS ALSO A STOCKHOLDER THEREIN, is not a competent witness for it in an action on a contract made by him as its agent; for he has a direct interest in the result of such action independently of his acts as agent.

ALL SURROUNDING FACTS OF A TRANSACTION should be admitted in evidence, if they can be established by competent means, and afford any fair presumption or inference as to the question in dispute.

AGENT OF CORPORATION WHOSE OBJECT IS TO CARRY ON A PARTICULAR KIND OF BUSINESS is limited in his agency to the business of the company connected with, or relating to such object.

COMPANY WHOSE CHARTER LIMITS IT TO THE PURSUIT OF PARTICULAR OBJECTS therein specified, can not contract, nor empower its agent to contract, in reference to objects differing essentially from those as specified in the charter.

USE OF REASONABLE CARE AND DILIGENCE ONLY IS REQUIRED of one who, without expressly agreeing to insure against all losses or injuries that may arise, undertakes to tow a vessel out of a harbor, through the ice therein; such contractor is not liable to the same extent as a common carrier.

PRINCIPAL DOES NOT RATIFY CONTRACT MADE BY HIS AGENT simply by receiving and retaining the consideration of such contract, unless he knew on what account the money was paid to him, and the terms of the contract on which it was received.

APPEAL from the Baltimore county court. The action was trespass on the case, and the allegations of the declaration appear from the opinion. The verdict was for the plaintiff, and the defendants moved in arrest of judgment for several reasons, the first of which is stated at length in the opinion. The substance of the other reasons is as follows: Of the second, that the promise of the defendants to carry out the *Hunter* was made for the consideration of thirty-three dollars and thirty-three cents, and the declaration does not aver that the said sum was ever paid to the defendants; of the third, that the declaration alleges the defendants' promise, and the consideration therefor, but does not aver that the plaintiff ever paid or promised to pay the consideration to the defendants; of the fourth, that the declaration does not sufficiently describe the property of the plaintiff on board the *Hunter*, nor show the number, kind, and quality of the goods. These objections were overruled, and judgment rendered for the plaintiff for two thousand three hundred and forty-seven dollars and seventy-nine cents. On the trial, the defendants offered to examine McElderry, with whom Jones, the agent of the plaintiff, testified that he made, for the plaintiff, the contract declared upon in this action, to prove by him what contract he did make, as agent for the defendants, with the agent for the plaintiff. But it being admitted that the proposed witness was a stockholder of the corporation defendant, plaintiff objected to the examination of the witness, and the court sustained the objection. The defendants offered to prove by Norris, a competent witness, that the enterprise of towing out the vessels through the ice originated with witness, who had several vessels detained by the ice in the harbor of Baltimore; that owing to the severity of the weather the harbor had been closed for a long time and the commerce of the city had been injured; that witness applied to Mesteer,

the president of the company defendant, and offered three hundred dollars to them if they would tow his vessels out; that said president was at first reluctant to make the attempt, but finally agreed, if a number of vessels offered, to tow them out; that when the president agreed to undertake the enterprise, it was distinctly understood by the witness, that the company were to be at no risk, and were not to be paid anything if they did not succeed in the undertaking; that this was the nature of witness' contract with the company. Plaintiff objected to the introduction of this testimony, and the court excluded it. The following is the substance of the several prayers for instructions asked by the defendants, and to which reference is made in the decision:

1. That the general object of the defendants' charter being to transport passengers from Baltimore to Philadelphia, and McElderry being their agent, his agency, unless otherwise proven, is limited to the business of the company connected with or relating to such object.

2. That the charter of the defendants limits them to the pursuit of particular objects therein specified, and that the breaking of ice, and towing vessels through the ice thus broken, where such vessels were destined for Virginia, is not one of those objects about which they could empower their agent to contract, and for which he could contract for them; at all events, not without a special power conferred for that purpose, or a subsequent ratification of such contract by the company.

3. That the plaintiff's evidence of the loss of, and injury to his goods, on board the Hunter, is inadmissible under the declaration in this action, for the purpose of establishing any claim to damage for such loss or injury.

4. That plaintiff is not entitled to recover for such loss or injury, because there is a fatal variance between the causes and manner of the loss or injury as alleged in the declaration, and the causes and manner of such loss or injury offered in evidence.

7. That if the jury believe there was no express agreement on the part of the defendants to be responsible for all losses and injuries that might arise if said vessel was not carried safely through the ice, and the defendants in towing the vessel used all proper and reasonable care and diligence, the plaintiff can not recover.

8. That if the jury believe that the Hunter, while being towed out through the ice, became, with other vessels in the line, de-

tached, and that the defendants' agents on their return up the track towards Baltimore offered to bring said vessel back to the city, and could and would have done so without injury to her or her cargo, but that the agents of the plaintiff having said vessel in charge refused said offer, and the plaintiff's goods on board were afterwards lost or damaged, the plaintiff is not entitled to recover for such loss or damage.

11. That if the jury believe that the Hunter could have returned to Baltimore, but neglected to do so, and that a loss happened in consequence of this neglect, the company are not responsible for such loss.

13. That if the jury believe that the agents of the defendants used all proper and reasonable care and diligence in the endeavor to take the Hunter out, and that she became detached from the line by misadventure, and not for want of any reasonable care or diligence on the part of said agents; and if upon their return up the track they offered to take her and her cargo back to Baltimore, and could and would have done so without injury to her or her cargo, but the agents of the plaintiff, although aware of her dangerous situation, refused the offer, and the plaintiff's goods were afterwards lost or damaged, then the plaintiff is not entitled to recover for such loss or damage.

14. That if the jury believe that the defendants did agree to be responsible for all loss or damage that might accrue to said vessel in being towed out through the ice, and if when she became detached through misadventure, and the defendants' agents on their return offered to take her back to Baltimore, which offer was refused, and if said agents, in refusing to then take her in the direction out from Baltimore, acted as any prudent master of a vessel would have acted under the circumstances, then the plaintiff is not entitled to recover.

16. That there is a fatal variance between the allegations of the declaration and the evidence offered, as to the causes and manner of the injury of or loss to the plaintiff's goods on board the Hunter.

17. That if the jury believe that the steamboats of the defendants, on their return up the track, and when they met the Hunter, had in tow vessels which they had previously agreed to bring in with them on their return, this fact is an excuse for their not immediately returning to tow out the Hunter.

18. That if the jury believe that McElderry was the general and ordinary agent of the defendants, and that his duties as such agent extended only to the making of contracts for the

transportation of passengers and merchandise between Baltimore and Philadelphia, and if the contract offered in evidence was for towing vessels going down to Virginia, such contract had no relation to the business of the defendants, and that McElderry was not authorized to make such contracts; not, at least, unless he had special authority from the defendants.

19. That if the jury believe that the contract in this case was such as is stated in the next preceding instruction, then it was not within the scope of the chartered power of the defendants, and the plaintiff is not entitled to recover thereon, even if McElderry was authorized by the defendants to make the same.

And the following is the substance of the fifth opinion and instruction given to the jury: If the jury believe the evidence of Dr. Jones, the plaintiff's agent, in reference to the contract to tow out the Hunter, and if they believe that agents of the defendants collected the amount to be paid under such contract from the plaintiff's agent while the vessels were being towed out, and if said money was afterwards paid over to the defendants, and if defendants have retained said money, then said facts are in law an adoption of the contract, and defendants are as much bound as if they had given a clear and precise authority to McElderry to make the contract on their account. The other facts are sufficiently stated in the opinion.

Glenn and McMahon, for the appellants.

Scott and Johnson, for the appellee.

By Court, DORSEY, J. The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant being thereby forewarned of the nature of the proof to be preferred against him, may, if necessary, be prepared to contradict, explain, or avoid it. The motion in arrest of judgment presents the question, as to the sufficiency of the narr filed in this case. After stating the "loading of certain goods, chattels, wares, and merchandise," on board the schooner Hunter, without further specification thereof, it alleges that the defendants undertook and faithfully promised the said plaintiff, that they, the said defendants, for and in consideration of the sum of thirty-three dollars and thirty-three cents, to be paid by the said plaintiff to the said defendants, would safely and securely take the said schooner or vessel so loaded as aforesaid, with the goods and chattels of

the said plaintiff, from and out of the ice, and from and out of the harbor and port of Baltimore aforesaid, to and at such point, or place of safety, in the said river or bay, below where the same was frozen, and below where the navigation thereof was obstructed by ice as aforesaid, by breaking the said ice, and towing the said schooner or vessel to such point or place of safety as aforesaid. Yet the said defendants, not regarding their said promise and undertaking, and not regarding their duty in this behalf, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, neglected and refused so to do, although thereto requested by the said plaintiff, whereby and by reason of the negligence and improper conduct of the said defendants, and their agents, the said schooner or vessel was injured, stranded, and lost, and the aforesaid goods and chattels, wares and merchandise of the said plaintiff, became and were greatly broken, damaged, and destroyed, and wholly lost to the said plaintiff.

The first reason assigned for arresting the judgment is, because the plaintiff's declaration does not show, or allege, any consideration for the defendants' undertaking and promise therein declared upon. This objection we think well founded, and is fatal to the plaintiff's right of recovery in the present state of his pleadings. The declaration sets out the promise and undertaking made by the defendants, but it alleges no agreement entered into between the plaintiff and defendants; it states no promise or obligation on the part of the plaintiff to pay the thirty-three dollars and thirty-three cents. Every allegation in the declaration may be true, and may have been proved on the trial, and yet no evidence has been offered to show that there ever was any agreement between the parties, or promise by the plaintiff to pay to the defendants the sum they required as the consideration for their services to be rendered. Their promise then was a *nudum pactum*, and no action would lie for their refusal to perform.

We do not think the second reason assigned for the reversal of the judgment, can be sustained. The plaintiff was under no obligation to pay until the services were rendered. The performance of their part of the agreement, had such an agreement as is alleged been entered into, is a condition precedent to the right of the defendants to demand the stipulated remuneration.

The opinion of this court upon the third reason assigned, is sufficiently expressed in our views on the two preceding reasons.

The motion in arrest we also think supported by the fourth reason. To enable the defendants to make the requisite preparations to meet the proof against them, in a case like the present, some more certain and definite description should have been given of the cargo, than that of "goods, chattels, wares, and merchandise:" See *Candler and Hart v. Roesiter*, 10 Wend. 487; Gould Pl. 503; Stephens Pl. 348; *Martin v. Hendrickson*, 2 Ld. Raym. 1007; *Wiatt v. Essington*, Id. 1410.

We next approach the questions raised on the several bills of exceptions taken in the county court, and first as to the admissibility of the testimony offered to be adduced as stated in the first bill of exceptions. In our opinion the county court erred in permitting the testimony offered to go to the jury. It was inadmissible under the pleadings in the cause, because the facts in proof of which it was offered had not been put in issue. The declaration simply charges the promise and undertaking of the defendants, their neglect and refusal to comply therewith, upon the request of the plaintiff, and that thereby the loss was produced.

These were the only facts in reference to this exception put in issue by the defendants' plea of *non assumpsit*. To meet proof in support of them, he was bound to come prepared; but not to defend himself against a cause of action resting on facts essentially different from those put in issue. The charge alleged was in substance a total neglect and refusal by the defendants to perform their undertaking, whereby the loss accrued. The evidence offered was by necessary implication to contradict such charge, and to show that the defendants had not wholly neglected and refused to fulfill their promise, but that they had in part executed their engagement, yet in a manner so negligent, imperfect, and improper, that the vessel and cargo were exposed to perils, to which but for such conduct they would not have been subject, and that thereby the loss accrued. Can it be said that in permitting such testimony to go to the jury, the sage and venerable maxim of the common law, "that the *allegata et probata* must correspond," would not have been violated? The materiality and importance of the proof in question upon the verdict of the jury, is manifested by the fact, that with it they gave a verdict for the plaintiff for two thousand three hundred and forty-seven dollars and seventy-nine cents; without it their verdict could only have been for nominal damages. It is true the plaintiff has alleged that the loss occurred not merely from the neglect and refusal of the

defendants to perform their contract, but by reason of the negligence and improper conduct of the said defendants and their agents: but it has not been even suggested in the argument for the appellee, that so general and indefinite a statement, without any specification of the acts of negligence and improper conduct complained of, would license the introduction of the testimony offered. Under the declaration before us, the plaintiff's right of recovery was limited to such damages only as naturally resulted from the defendants' total neglect and refusal to perform their contract; he was not at liberty to inflame them by the evidence alleged to have been offered in the first bill of exceptions.

In the argument on the part of the appellants, it has been urged that the contract proved in evidence, varies from that alleged in the declaration, and therefore was inadmissible before the jury. Two variances have been suggested: the first is, that the narr states to tow out the vessel and cargo safely and securely, which would cover losses from any and every cause, and the proof is of a contract to tow out the vessel and cargo, "free of damage of ice." This objection would be well founded if the defendants were in a condition to avail themselves of it in this court. The second variance is that the declaration states the consideration to be paid for towing out, to be thirty-three dollars and thirty-three cents, and the proof states it to be thirty-three dollars and thirty-three and one third cents. The variance alleged is one third part of a cent. If this question were properly before us, we should hesitate long before we would declare that a difference between the *allegata* and *probata* of one third of a cent, to represent which we have no coin, currency, or means of payment, was a fatal variance. But neither of these questions of variance is presented for our determination. The proof of the contract never was objected to in the county court, and surely since our act of assembly of 1825, such a question of variance can not be raised in this court. The testimony to which objection was taken in the first bill of exceptions, was not that which proved the contract, but that which was "offered" to prove its imperfect execution, and the consequences ensuing. As authorities sustaining some of the views of this court on the points raised on the first bill of exceptions, see Archb. Civ. Pl. 170; *Doane v. Badger*, 12 Mass. 69; 2 Stark. Ev. 815; 1 Id. 366; 2 Chit. Pl. 329-331; *Fitzsimmons v. Ingles*, 5 Taunt. 534.

We concur with the county court in their rejection of Mc-

Elderry as a witness for the purpose for which he was offered. Although it has been in many cases determined that an agent is from necessity a competent witness to prove the terms of a contract made by him, even though in his character of agent he may gain or lose by the event of the suit, yet we have met with no case in which it has been held that a person having a direct interest in the event of the suit, independently of his acts as agent, can by being employed as agent, be rendered a competent witness to prove even the acts of his own agency. If the principle contended for in this case were sanctioned, it could scarcely be called an extension of the doctrine to say, that a copartner selling for his firm, was a competent witness to prove the sale and the terms thereof, or that the like facts might be proved by an owner himself who disposed of his own property without the intervention of an agent. To this length we do not feel inclined to extend this principle of necessity, but rather concur with a learned commentator on the law of evidence, who in treating on this subject says, it is to be remarked that the law has been justly jealous of any extension of this rule, and that its operation, in consequence, has been very limited in practice: 2 Stark. Ev. 753.

The only question presented by the third bill of exceptions, is as to the admissibility of the testimony of Norris. It is correctly stated in 1 Stark. Ev. 46, that all the surrounding facts of a transaction, or, as they are generally called, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute. The matter here in dispute in relation to which this evidence was offered, was, what were the terms of the contract between the plaintiff and defendants below, for the towing of the Hunter and her cargo out of the ice by the steamboats of the defendants. It was no part of the usual employment of their steamboats, or of the business of the defendants, but was an isolated enterprise in which they had consented to engage, not with the view to profit, but to accommodate the owners of vessels confined in the port of Baltimore by the ice, and they demanded nothing more for their services than reimbursement for the probable cost of the enterprise. That the amount paid by each owner was in proportion to the tonnage of his vessel, and that it was the distinct understanding of the witness, at whose instance this enterprise was entered into by the defendants, at the time it was entered into, that they were to be at no risk, and were not to be paid anything if they did

not succeed in the enterprise. That the defendants expressed much reluctance to accede to this arrangement, and finally agreed to it on condition that a number of vessels offered to be towed sufficient to bear the cost of the enterprise; that a sufficient number was accordingly procured.

In determining on the admissibility of the testimony offered, it must be conceded, that all these facts and circumstances would have been established by the witness to the satisfaction of the jury. It must also be conceded as a fact recognized by the common sense of every man, that a vessel with a cargo on board requires a greater power to tow her out than one of the same tonnage without cargo. The verity of Captain Taylor's evidence must also be conceded. Assuming, then, the truth of the facts and existence of the circumstances enumerated, let us test their admissibility by the rule of evidence laid down by Starkie. Do they afford any fair presumption or inference as to the question in dispute? In our opinion they do. The testimony of Captain Taylor is sufficient to warrant the jury, if they saw fit to do so, in finding that Jones knew before he entered into any contract for the towing out of the plaintiff's vessels, what the terms of the arrangement were. Without such knowledge, is it to be presumed, that without making the slightest inquiry as to the terms, he would have directed the president of the company to "set him, Jones, down for two vessels?" Or if the jury should not find such antecedent knowledge in Jones, the proof of Captain Taylor was sufficient to justify the jury in finding a perfect willingness to assent to his vessels being towed out upon the same terms which by the arrangement were imposed on all other owners. Taylor also proves that Meeteer, after he had been directed by Jones to set down his two vessels, told him, "that the company would not be at any risk nor responsible for the property." With this communication, Jones does not appear to have expressed either surprise or dissatisfaction, nor does he countermand his order to set him down for two vessels. Standing alone, might not the inferences deducible from Taylor's testimony, be legitimately urged on the jury, as if not wholly irreconcilable with Jones' proof of his contract with McElderry, at least as casting on it a shade of suspicion as to its accuracy? Is it probable that Jones would have exacted such terms? Was it an act of fair dealing in Jones, after acceding to the terms upon which alone the defendants assented to act, to procure from their agent a contract which they never authorized, and which was a

wanton sacrifice of their interests? Was it probable that their agent ever entered into such a contract? Connecting these probabilities as to the accuracy of Jones in relation to the contract, with the testimony of Norris, that the defendants were to be at no risk—that each vessel paid in proportion to tonnage, and consequently that nothing was paid to the defendants for towing out the Hunter's cargo, nothing for the alleged insurance of either vessel or cargo, can it be contended, that all the facts and circumstances adverted to, when weighed in connection, were not proper to be submitted to the jury to find, if they saw fit to do so, that Jones had mistaken or misstated the terms of the contract on which the plaintiff had rested his right of recovery?

But there is another aspect of this question, in which we think the testimony of Norris ought to have been received. Jones had sworn that he had made one contract with McElderry. Taylor had sworn that the contract was made with Meeteer, and it was the province of the jury, not of the court, under all the facts and circumstances surrounding the matter in controversy (of which those detailed by Norris were a very material part), to determine between whom the contract was made and what were its terms. To enable them to do this, the testimony of Norris was not only admissible but indispensable. We therefore think the county court erred in rejecting it. The case referred to by the appellee's counsel, of *Boyle et al. v. McLaughlin*, has no bearing upon the question now before us. The court's rejection there of the clerk's testimony, in the fourth bill of exceptions is unquestionably correct; as had he proved that the habitual communications of Boyle, which he detailed, had been made to McLaughlin himself at the time of their contract, they could not have been received in evidence, being offered to alter and change the written contract between the parties.

We think the county court erred in refusing the appellant's first prayer in the fourth bill of exceptions; the instruction which was asked from the court to the jury being the natural inference both of law and fact, not only to the extent of the prayer, but perhaps further might their instruction have been extended. In the law of Principal and Agent, 259, it is stated, that by a general agent is understood not merely a person substituted for another for transacting all manner of business, but a person whom a man puts in his place to transact all

his business of a particular kind, as to buy and to sell certain kind of wares, to negotiate certain contracts, and the like.

The second direction, also at the instance of the defendants, ought to have been granted by the court below. In *Angell and Ames on Corp.* 139, it is justly observed, that a corporation and an individual stand upon very different footing. The latter existing for the general good of society, may do all acts and make all contracts which are not, in the eye of the law, inconsistent with the great purpose of his creation; whereas, the former having been created for a specific purpose, can not only make no contract forbidden by its charter, which is as it were the law of its nature, but in general, can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose.

In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether a power to make such a contract may not be implied, on the part of the corporation, as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to that purpose. In page 60 of the same book it is stated, "that a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted," "and that a corporation is confined to the sphere of action limited by the terms and intention of the charter."

According to these wise and now well-established principles, the appellants had no power to bind themselves by such a contract as that attempted to be enforced against them, and possessing none themselves, they could not delegate it to *McElderry*, their agent. At the instance of the defendants then, the court should have granted the direction prayed for. The instruction should have been given if required without the qualification attached to it; but it is no ground for refusing the prayer of a party because he asks less than he is entitled to at the hand of the court.

It has been urged that the defendants having entered into this contract are estopped from denying their competency to have done so. To the doctrine of estoppel applied to such cases we can not yield our assent. If the corporation is es-

topped from denying its power, the estoppel operates with like effect upon those who contract with them, and the result would be that no matter how limited the design and powers of a corporation may appear in its charter, practically it is a corporation without limitation as to its powers. Such a doctrine at this day is dangerous to the interest of the community, and is at war with the modern decisions upon the subject. We therefore think the county court erred in refusing the second direction prayed for by the defendants: *New York Fire Ins. Co. v. Ely*, 5 Conn. 560 [13 Am. Dec. 100]; *The People v. Utica Ins. Co.*, 15 Johns. 383 [8 Am. Dec. 243]; *The North River Ins. Co. v. Lawrence*, 3 Wend. 482; 4 Kent Com. 240; *New York Fire Ins. Co. v. Ely and Parsons*, 2 Cow. 678; *Broughton v. Salford Water Works*, 1 Eng. Com. L. 215.¹

We think the court erred also in refusing to give the defendants' third and fourth directions for the reasons assigned by us in the consideration of the first bill of exceptions.

We think the court erred too in denying to the defendants their seventh direction. Could they have lawfully assumed the obligations imposed on them by such a contract as under this direction it was left to the jury to find, they were not answerable to the same extent that common carriers would have been. They were only bound to use reasonable efforts, care, and diligence in the execution of their undertaking: *Caton v. Rumney*, 13 Wend. 387.

We concur with the county court in refusing to give the eighth direction contained in the fourth bill of exceptions. As far as that direction is concerned, the defendants admit the legal validity of their contract, but require the court to instruct the jury that if they believe the facts therein enumerated, that then the plaintiff is not entitled to recover. These facts do not *per se* justify such a verdict as the court were called upon to direct them to give. Such an instruction could not have been given to the jury without withdrawing from them the determination of other facts, indispensable to such a finding as they were called on to make. Before such a direction could be given, the court must have assumed as facts so conclusively proved as not to be left open for the consideration of the jury, that the defendants had used all reasonable efforts, care, and diligence to tow the *Hunter* and her cargo through the ice. The proof in the cause by no means warranted such an assumption on the part of the court, and it rightfully therefore refused to withdraw

1. 4 Eng. Com. L., 215; S. C., 3 Barn. & Ald. 1.

from the jury the determination of those disputed facts, on which it was their exclusive privilege and duty to decide.

For the same reasons the court were right in refusing to grant the plaintiff's eleventh direction.

The court below were right in refusing the thirteenth direction. It assumes, without assigning any reason therefor, that it was not the duty of the defendants' steamboats upon their return up the track to tow out the Hunter and her cargo which had been left behind by misadventure. In the absence of all adequate excuse for not doing so, if the jury believe the contract as proved by Jones, it was the duty of the steamboats on their return to have towed out the Hunter and her cargo. This direction is not supported, as has been supposed, by the case referred to in 13 Wendell. Here the voyage, the business of the steamboat, was to tow the vessel safely out of the ice; according to Jones' testimony they were bound to use all reasonable efforts within their power to accomplish that end. In the case in Wendell the steamboat was bound on a regular trip from port to port. With a knowledge of this fact, the plaintiff, the owner of a small boat, applied to the master of the steamboat to tow his freight-boat down to the steamboat's port of destination. The master told him he thought his boat was too heavily laden to be towed down, as the south wind was rising. The plaintiff said he was very anxious to get down, and he must and would go, and accordingly fastened his boat to the steamboat and the vessels proceeded on their voyage. The plaintiff's boat filled with water and sunk, and the court determined that the master of the steamboat was only answerable for reasonable care and diligence, and the court predicate their opinion upon the ground that the master of the steamboat was not the insurer of the plaintiff's boat, and therefore ordinary care and diligence was all that was required of him. But the inference is irresistible, that if there as here, according to the proof of Jones, the defendant had been the insurer of the plaintiff's vessel, he could not have discharged himself but by the use of extraordinary care and diligence.

The county court erred in refusing to grant the defendants' fourteenth direction. If the jury had found the facts submitted to them by the prayer, the agents of the defendants had used all the efforts to perform their contract, which under the circumstances of the case were imposed on them by law, consequently the plaintiff had no cause of action against them.

We think the county court were right in refusing the fifteenth

direction of the defendants; as to discharge the defendants under it, the jury must be satisfied that the loss was occasioned by the default or misconduct of the agents of plaintiff, and this fact is not committed to the finding of the jury with that distinctness and certainty, with which it ought to have been. It is true the jury were required to find that the commander of the Hunter was aware of the danger of his situation. But the magnitude of the danger they were not required to find. Their verdict was to have been the same, whether the danger was such as to render the loss of the vessel in the highest degree probable, and would therefore have been avoided by every commander of ordinary skill and prudence, or whether the danger of loss was so light and trivial, that under the circumstances in which the Hunter was placed no commander of ordinary skill and prudence would have suffered her to be towed back to the port of Baltimore. The court should have granted the direction prayed; provided, that in addition to the facts submitted to them, the jury also found that such was the perilous situation of the Hunter, that no commander thereof of ordinary skill and prudence would have refused to avail himself of the offer of being towed back to the city of Baltimore.

The court below erred in rejecting the defendants' sixteenth instruction, for the reasons assigned by this court in disposing of the first bill of exceptions.

The county court we think were clearly right in refusing to grant the defendants' seventeenth direction upon this obvious ground if all others were wanting: There was no evidence to have been left to the jury to find the fact, that at the time Jones contracted with McElderry for the towing out of plaintiff's vessels, he knew the steamboats were under contract to tow other vessels up the track on their return to Baltimore.

The county court in our opinion erred in refusing to instruct the jury as required by the defendants' eighteenth and nineteenth directions, for the reasons we have given in examining the correctness of the county court's refusal of the second direction.

We think also that the court below erred in their fifth opinion and instruction to the jury, as to what facts it was necessary to find, to show that the defendants had adopted and ratified the contract alleged to have been made between Jones and McElderry. The cause of action in this case arose after the twentieth of December, 1831, and the suit was instituted in less than ten days thereafter; no proof was offered that the

defendants ever had any knowledge of the terms of the contract proved by Jones, to have been made by him with McElderry, or that the agent who collected the money for the towing out of the plaintiff's vessels ever paid the defendants the amount collected by him, or communicated to them the fact that any such money had been collected, or on what account it was collected. The court however instructed the jury, if the consideration for the towing out of the plaintiff's vessels, as agreed on between Jones and McElderry, was collected by one of the defendants' agents on their way out of the ice, and paid over to the defendants, who have ever since retained the same, as also all the other money that was received from the other vessels towed out of the ice at the same time, "that then the said facts are in law an adoption of the contract, under which said money was paid by plaintiff, and that said contract is as binding on defendants as if there was clear evidence of a precise authority from defendants to McElderry, to enter into said contract on their account."

This instruction is erroneous on two grounds: 1. That the jury were not required to find that the defendants knew on what account the money paid to them was received; 2. That the defendants knew the terms of the contract on which the money was received. If the jury failed to find either of these facts, and they were not instructed that the finding of either was necessary, they were not at liberty to find, nor is it an inference of the law that the defendants adopted the contract under which the money was paid: See *Bell et al. v. Cunningham et al.*, 3 Pet. 69. We concur with the county court in its opinion on the second bill of exceptions, and in the rejection of the eighth, eleventh, thirteenth, fifteenth, and seventeenth directions asked by the appellants in their fourth bill of exceptions, but dissenting from its *pro forma* decision on the motion in arrest of judgment, and from its decisions on the first and third bills of exceptions, and from its refusal to grant the first, second, third, fourth, seventh, fourteenth, sixteenth, eighteenth, and nineteenth directions prayed for by the appellants in their fourth bill of exceptions, and also dissenting from the fifth opinion and instruction given by the county court to the jury, we reverse their judgment.

As the appellee in no aspect of his case is entitled to recover, no *procedendo* will issue.

Judgment reversed.

Cited in *Hoke v. Wood*, 26 Md. 460, to the point that the contract set out in a declaration must be substantially proved; in *Adams Express Co. v. Trego*, 35 Id. 69, and in *Busby v. The North American Life Ins. Co.*, 40 Id. 588, to the point that the ratification of an agent's act, to be effectual, must be shown to have been made with knowledge by the principal of all the material facts and circumstances attending the act to be ratified; in *Weckler v. First National Bank*, 42 Id. 591, to the point that a corporation has no other powers than those specifically granted in its charter or necessary to carry out those that are so granted; in *Third National Bank v. Boyd*, 44 Id. 61, to the point that a corporation can plead that its agent exceeded his authority; in *Brown v. Winnisimmet Co.*, 11 Allen, 331, to the point that a corporation can plead that a contract upon which it is sued is beyond the scope of the power granted by its charter; and in *The Neaffle*, 1 Abb. (U. S.) 468, to the point that towboats are not common carriers.

CONSIDERATION MUST BE EXPLICITLY AND CORRECTLY STATED in declaration: *Curley v. Dean*, 10 Am. Dec. 140.

VARIANCE IN ACTIONS ON CONTRACTS, when fatal: See *Walsh v. Gilmor*, 6 Id. 502; *Curley v. Dean*, 10 Id. 140.

CORPORATION IS BOUND BY ITS AGENT'S ACTS only when done within the scope of his authority: See *Leggett v. N. J. Mfg. & Banking Co.*, 23 Am. Dec. 728; *Rabassa v. Orleans Navigation Co.*, 25 Id. 200.

CORPORATION CAN ONLY EXERT POWERS SPECIFICALLY CONFERRED by its charter: *Leggett v. N. J. Mfg. & Banking Co.*, 23 Am. Dec. 728; *N. Y. Firemen Ins. Co. v. Ely*, 13 Id. 100, note 108; *People v. Utica Ins. Co.*, 8 Id. 243.

STOCKHOLDER IS NOT COMPETENT to be a witness for a corporation: See *Lynch v. Poellethwaite*, 12 Am. Dec. 495.

MARSHALL'S LESSEE v. GREENFIELD.

[8 GILL & JOHNSON, 349.]

DESCRIPTION OF PROPERTY SOLD BY SHERIFF, WHAT SUFFICIENT.—Every reasonable intendment will be made in aid of *bona fide* purchasers at judicial sales, and to effectuate the object which it was the duty, and, as the law presumes, the design of the officer to accomplish; hence, this description in the schedule of property sold by the sheriff "to one, of land called and known by the name of 'Indian creek, with addition,' containing two hundred and seventeen acres, more or less," is sufficient.

APPEAL from St. Mary's county court. Ejectment brought by the plaintiff against the defendant for a tract of land called "Indian creek, with addition." At the trial it appeared that in an action of debt brought by Marshall and Forbes against Greenfield, the plaintiffs recovered judgment in the St. Mary's county court, and that the docket and all the original papers in said cause were burned in the court-house of said county when it was destroyed by fire. The plaintiff then gave in evidence the following extract of docket entries of *fi. fa.*:

"*Marshall and Forbes v. Thomas Greenfield.*—Extract of record

of *fi. fa.*, levied as per schedule, and sold to plaintiffs' agent for five hundred dollars. Joseph Gough, sheriff." The schedule referred to is as follows: "The schedule of property of Thomas Greenfield, taken by a writ of *fi. fa.*, to satisfy a debt due Marshall and Forbes, after being duly summoned and sworn by the sheriff, this seventeenth of April, 1812. To one — of land, called and known by the name of 'Indian creek, with addition,' containing two hundred and seventeen acres, more or less, for two thousand one hundred and seventy dollars. Joseph Gough, sheriff."

The defendant prayed the court to instruct the jury, that the levy on the said land, made as aforesaid, was void for uncertainty, which instruction the court gave, and the verdict being for the defendant, the plaintiff appealed.

McMahon, for the appellant.

Tuck and Causin, for the appellee.

By Court, CHAMBERS, J. This is a judicial sale, made for the purpose of carrying into effect the judgment of a competent court. The levy and sale were made by an acknowledged officer, in the regular course of duty, and no exceptions appear to have been taken to his proceedings for want of form, at the return of the execution, when on motion, any informality would have been examinable. The law regards such a proceeding with favor, and although it will not give effect to an instrument, or paper executed by such officer, if its terms are unmeaning, or so entirely vague, as to make it uncertain what was intended, yet every reasonable intendment will be made to secure *bona fide* purchasers, and to effectuate the object, which it was the duty, and, as the law presumes, the design of the officer to accomplish. The presumption in such a case, is at least as proper and as strong as in the case of a grantee claiming against a grantor, when the utmost effect is given to the terms of the grant, *ut res magis valeat quam pereat*. It is admitted, and can not be denied, that if this were the case of grantee against grantor, the whole tract would pass.

The rights of the defendant are not concluded in any respect by this construction. If she has a title, the sale will not affect it; if she has none, that fact presents no claim, upon which to entitle her to lessen the favor with which the law regards the proceedings of its officer, to change the presumption by which

his acts are supposed to be rightly performed, or to narrow the construction given to his grant.

Judgment reversed and *procedendo* awarded.

DESCRIPTION IN SHERIFF'S DEED: See *Jackson v. Delancy*, 7 Am. Dec. 403.

DEL. AND MD. RAILROAD CO. v. STUMP.

[8 GILL & JOHNSON, 479.]

GRANT OF A SEVERAL FISHERY IN A PUBLIC NAVIGABLE RIVER CAN NOT BE PRESUMED from the mere uninterrupted use and enjoyment of the right of fishing for upwards of twenty years.

COURT WILL NOT PRESUME A GRANT OF LAND UNDER NAVIGABLE WATERS, to the owners of the adjacent soil, without evidence of long exclusive possession and use, and the omission to make such averment in a bill for an injunction to protect the complainant in the exclusive right of fishery in such waters, is fatal thereto.

REMEDY BY INJUNCTION IS APPLICABLE ONLY TO SPECIAL INJURIES, in violation of private right; and individuals are not authorised to redress public grievances at their own suit, either at law or in equity.

APPEAL from chancery, from an order granting an injunction to restrain the defendants from erecting a wharf to the injury of complainant's right of fishery, and an order refusing to dissolve it on motion. The opinion states the case.

Scott and Mayer, for the appellants.

Stump and Constable, for the appellee.

By Court, SPENCE, J. The complainant in his bill charges, that heretofore John Stump, the father of this complainant, being seised in fee under grant by patent from the state of Maryland, of a tract of land called Perry point, situate in Cecil county, at the mouth of the Susquehanna river, established upwards of twenty years since certain fisheries on said property, and at which by means of seines hauled over certain portions of said river, large quantities of shad and herring were annually taken.

That afterwards the said John Stump departed this life, having by his last will and testament executed in form and manner, sufficient to pass real estate, devised said estate, with all and singular its rights and advantages of fishery to your orator, under which said devise he entered, etc.

That on the second day of March, 1811, the said John Stump leased and demised to one Martha Coffield, of Cecil county, for

the term of ninety-nine years, with covenants for the renewal thereof, eight acres of said estate, binding on the said public road, leading from the Susquehanna river to Chestertown, and along said river, etc.

The bill also charges the river Suquehanna to be a public navigable river, and that the erecting this wharf, and the employment of steamboats, will be destructive of the paramount interest of general navigation and fishing, and that any obstruction of those rights would be void.

In this cause it is the object of the complainant to establish his right to a several fishery, and he alleges, that the uninterrupted use and enjoyment of the same for more than twenty years, is sufficient in law to raise the presumption of a grant of a several fishery. There is not to be found in the bill any allegation of an exclusive possession and use of this fishery, by the complainant, and those under whom he claims, nor is it averred, that others did not use and enjoy this right of fishing in the *locus in quo* in common with this complainant. The bill charges this to be a public navigable river, where this several fishery is attempted to be established by presumption, and upon these allegations this court is called upon to decide, that a grant is to be presumed of an exclusive fishery.

We know of no principle of law, and we have seen no adjudicated case, which sanctions such a conclusion. That a presumption can be raised of a grant of a several fishery in a public navigable river, from the fact of an individual using the same in common with others, is at this day a strange doctrine: and the bill in this case does not allege, that the complainant, and those under whom he claims, had an exclusive possession; and it is the uniform language of the courts, that they will not presume a grant of land under navigable waters, to the owners of the adjacent soil, without evidence of long exclusive possession and use, to warrant such presumption: *Palmer v. Hicks*, 6 Johns. 133. If it be law, that a court will not presume a grant of a several fishery in a public navigable river, without proof of long exclusive possession and use, it follows as an irresistible conclusion, that the omission to make such averment is fatal to this bill.

The allegation in the bill, that the erecting the wharf, and the employment of steamboats, will be destructive of the paramount interests of general navigation and fishing; and any grant destructive of those rights, though void, furnishes no ground for injunction; but it, the remedy by injunction, is ap-

plicable only to special injuries, in violation of private right; and individuals are not authorized to redress public grievances at their own suit, either at law or in equity.

In the above decision we do not desire to be considered as expressing the opinion, that if there had been an averment of an exclusive fishery from long adverse enjoyment, that by the laws of this state, a legislative grant might or might not be presumed; but leave that question open for future decision when it shall arise.

Injunction dissolved.

NO ONE HAS RIGHT TO EXCLUSIVE FISHERY in a navigable river: See *Carrson v. Blumer*, 4 Am. Dec. 463.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

FARROW v. COMMONWEALTH INSURANCE Co.

[18 PICKERING, 53.]

OWNERS OF AN INSURED VESSEL MAY SUE ON THE POLICY in their own names, where it states that the insurance was effected by certain brokers named therein, "for the owners, payable" to such brokers, and the said brokers consent to such suit, it not appearing that the insurers have any claim against the brokers so named in the policy.

DEPOSITIONS TAKEN ABROAD, IN THE ABSENCE OF AN ATTORNEY FOR THE ADVERSE PARTY, and returned and filed and placed in the hands of such party's attorney of record more than a year before the trial, and not objected to until then, are admissible, the objection being deemed waived by the delay in making it.

ASSUMPSIT on a policy of insurance on a schooner belonging to the plaintiffs. The defendants objected that the plaintiffs could not sue in their own names because it appeared by the policy that the defendants "caused Copeland & Lovering, for the owners, payable to Copeland & Lovering, to be insured" in the sum specified. It appearing, however, that Copeland and Lovering had no interest in the policy and had delivered it to the plaintiffs to enable them to bring this action, the objection was overruled. Objection was also made to certain depositions of Williams and others, taken in North Carolina, and offered by the plaintiff, because it appeared by the certificate that no one was present on behalf of the defendants when they were taken. The depositions were returned and filed, however, in December, 1834, and were put in the hands of the defendants' counsel soon afterwards, but no objection was made to them until the

trial in January, 1836; wherefore the depositions were received notwithstanding the objection. Verdict for the plaintiffs, and a motion for a new trial, based on the two objections above mentioned.

Fletcher, for the defendants.

S. Hubbard and W. D. Sohler, for the plaintiffs.

By Court, PUTNAM, J. The defendants object: 1. That the plaintiffs can not maintain the action in their own names; and if they can, then, 2. That the depositions of Willis Williams and others, ought to have been rejected.

The stress of the argument of the defendants' counsel on the first point, was, that as the loss was by the terms of the policy to be paid to Copeland & Lovering, it necessarily restricted the action to be brought in their names; that it was an express contract to pay Copeland & Lovering, and could not be varied without the consent of both parties; and that the defendants have not consented or agreed to pay any other persons than Copeland & Lovering in case of loss.

Much reliance seems to be placed on the words "payable to Copeland & Lovering." But if the action were brought in the names of Copeland & Lovering, and they should recover judgment and execution, the money would be payable to them, and it would be for the use of the owners. The legal operation would in that case be just equivalent to the particular provision. And if those words were not inserted in the policy, it seems to be conceded that this action might well be maintained in the names of the owners.

It does not appear that the defendants have any claim against Copeland & Lovering. And the court can not presume the fact without evidence. Whether the defendants could be protected if such were the fact, is not the matter for our decision upon the facts before us in this suit.

There are obvious reasons for the introduction of the clause in question. The insurance brokers might desire to have the loss paid to them to indemnify them for any advances for premium or otherwise, which they might have against the owners; and the insurance company might desire to have that clause, to enable them to set off any legal claim which they might have against the insurance brokers. And it would authorize them to pay the loss to the brokers, without any power of attorney from the owners. But in the case at bar these reasons do not apply. For the brokers, Copeland & Lovering, have

certified in writing, that they have delivered the policy to the plaintiffs to enable them to recover the loss; and they say that they have no interest whatever in the suit.

The action upon this policy might have been commenced in the names of the insurance brokers, for the benefit of the owners: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 82 [22 Am. Dec. 567]; or it might be brought in the names of the plaintiffs, the owners: *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76. "If," says Buller, J., "one person makes a promise to another for the benefit of a third, that third may maintain an action upon it:" 3 Bos. & Pul. 149, *in notis*.¹ "In policies of insurance, it is a common practice to bring your action either in the name of the party by whom the contract was made, or of the party for whom the contract was made:" *Per Bayley, J., Sargent v. Morris*, 3 Barn. & Ald. 281. This matter seems, however, too clear to require the citation of authorities to support it.

As this cause is situated, it seems to be very clear, that the plaintiffs may maintain the action in their own names. The insurance brokers consent, and say they have nothing to do with the matter; and the defendants do not show that they have any matter of set-off against the brokers, so that we all think that the objection upon this point can not be sustained.

And we think, that the objection made to the admission of the depositions of Williams and others can not prevail. The objection was, that it appeared that at the time of taking the depositions under the commission, an attorney was present on the part of the plaintiffs, and no one on the part of the defendants. Such has unquestionably been the practice, and it is not to be disallowed, until the court shall have provided, and given notice of some rule to the contrary. It is liable to all the observations which the defendants' counsel have made. We have provided for the case in the rules which we have made, and which will be published as soon as it may be convenient, after the revised code shall come into our hands. But if the objection were tenable, we all think it should be considered as waived by the counsel for the defendants. It existed, if ever, as early as December, 1834, and was known to the counsel who then conducted the defense; and it could not avail the defendants now, for the reason, that the counsel now engaged for the defendants have recently had knowledge of the fact. But if the objection had been made in season, we could not have prop-

¹ *Marchington v. Vernon*.

erly interfered before establishing and promulgating some rule of practice to the contrary.

Let the judgment be entered for the plaintiffs, according to the verdict.

INSURANCE EFFECTED BY AGENT FOR INSURED.—A contract of insurance entered into by one as agent is the principal's contract, although the policy provides that payment shall be made to the agent in case of a loss, and in an action by the principal after a loss it is no defense to show that the agent is indebted to the insurer in an amount exceeding the sum due on the policy: *Braden v. Louisiana State Ins. Co.*, 20 Am. Dec. 277. In the absence of some such general clause as "for whom it may concern," a policy is held to be suable only by those named therein, or for whose benefit it is expressed to be made: *Newson v. Douglass*, 16 Id. 317. To the point that the owners of an insured vessel, or those for whose benefit the insurance was effected, may sue on a policy as well as the party in whose name the policy was issued, and to whom it was made payable, the principal case is cited as authority in *Aldrich v. Equitable Safety Ins. Co.*, 1 Wood & M. 276; *Williams v. Ocean Ins. Co.*, 2 Metc. 305; *Somes v. Equitable Safety Ins. Co.*, 12 Gray, 532.

SUIT BY PRINCIPAL ON CONTRACT WITH AGENT: See *Girard v. Taggart*, 9 Am. Dec. 327 and note; and *Arlington v. Hinds*, 12 Id. 704 and note. As to the right of the principal to sue where the agent contracts without disclosing his principal, see *Tutt v. Brown*, 15 Id. 33; *Beebe v. Robert*, 27 Id. 132 and note.

AGENT MUST SUE ON CONTRACT IN HIS NAME, WHEN: See *Cocke v. Dickens*, 26 Am. Dec. 214, and other cases in this series referred to in the note thereto. See also *Potts v. Rider*, 17 Id. 581.

DEPOSITIONS, ADMISSIBILITY OF AS EVIDENCE.—A deposition may be read in evidence where the witness is shown to be a resident of another state: *Jenkins v. Richardson*, 22 Am. Dec. 82. Where a deposition has been taken without notice to some of the defendants, it may nevertheless be received in evidence against those who were notified, if the action will admit of separate verdicts: *Jones v. Pücher*, 24 Id. 716. If it appear that the opposite party appeared and cross-examined a witness, his deposition is admissible, although no notice was given: *Rogers v. Wilson*, 12 Id. 61. Notice to take a deposition must specify the time and place: *Hunter v. Fulcher*, 16 Id. 738. The deposition of a deceased witness taken in the absence of the defendant is inadmissible in a criminal action: *State v. Hill*, 27 Id. 406. See, generally, as to the admissibility of depositions taken under an act to perpetuate testimony, *Jackson v. Rice*, 20 Id. 683. As to the inadmissibility of a deposition where the witness is able to attend the trial, see *Gordon v. Little*, 11 Id. 632.

PEIROE v. OCEAN INSURANCE CO.

[18 PICKERING, 83.]

MASTER OF A VESSEL HAS NO IMPLIED AUTHORITY TO SELL HER without communicating with the owner or insurer, so as to enable the owner to claim for a total loss, on account of an injury to more than half her value, where, after the injury, she reaches her destination without repairs and is lying in safety at a wharf, and the master has ample oppor-

tunity to give notice of abandonment directly to the insurer, or indirectly through the agent of the owner, even though such sale is recommended by surveyors after a survey.

WHERE THE MASTER IS PART OWNER, the insurers are not liable as for a total loss, in case of an injury from one of the perils insured against to more than half the value of the vessel, where a sale is made by such master under circumstances which would not authorize him to sell as master.

CO-OWNERS ARE BOUND BY A SALE BY THE MASTER WHO IS PART OWNER, where they ratify such sale by joining in a claim upon the underwriters for a total loss, crediting the proceeds of the sale by way of salvage after deducting all charges.

WITHOUT AN ABANDONMENT there can be no recovery for a mere constructive total loss arising from an injury to more than half the value of the vessel.

ABANDONMENT MUST BE POSITIVE AND ABSOLUTE, and must in express terms, or by necessary implication, import an actual present relinquishment of the interest or subject-matter to which the abandonment applies, and must truly state the reasons or grounds upon which the abandonment is made and a total loss claimed.

ASSURED CAN NOT AVAIL HIMSELF OF ANY OTHER GROUND OF ABANDONMENT than that stated at the time of abandonment. Hence, where an abandonment is made on the ground of damage done to the vessel by a certain injury, and of her being afterwards surveyed, condemned, and sold for the good of all concerned, a subsequent claim for a total loss on the ground that the injury was such as to require repairs to more than half the value of the vessel, can not be sustained.

ASSUMPSIT on a policy of insurance on a certain brig for one year at sea and in port, the insurance being payable to the plaintiff, and the plaintiff averring that he effected the said insurance by the order and on behalf of Waldo Peirce, Robert Treat, and Andrew Tyler, the master, who "were interested in said vessel to the amount of all the sums insured" thereon, and claiming as for a total loss by a peril of the sea on a voyage from New York to Mobile. It appeared that on the said voyage the brig struck on Carysford reef, and was in so great danger that part of the cargo was thrown overboard and part delivered on board certain wreckers. She was, however, got off the reef and taken to Key West, arriving there February 3, 1834, and after a survey, was, by direction of the surveyors, taken to Mobile, arriving March 2. She discharged her cargo March 15, and lay in safety at the wharf. Surveys and estimates of repairs being made, the surveyors recommended that the vessel be sold. The master sold her April 2, 1834, and the purchaser immediately repaired her and sent her to sea. The plaintiff further offered to show, in proof of abandonment, that on May 13, after the news reached Boston, he called on the

defendants with the documents to show the loss and its amount, and claimed for a total loss. The evidence offered on that point is stated in the opinion. Evidence was offered by the defendants to show that the brig was actually repaired at much less than the sum estimated, and by the plaintiff, to show that she was not and could not have been thoroughly repaired for less than half her value, deducting new for old. The judge, however, decided that the sale, under the circumstances, was unauthorized, being made without notice to owners or insurers, and that there being no abandonment, the plaintiff could not recover for a total loss, even if it would have cost more than half the value of the vessel to repair her, and rejected the plaintiff's evidence. Upon the correctness of this ruling the case was submitted to the whole court. If the ruling was erroneous, there was to be a new trial; otherwise the case was to go to a jury to ascertain the facts, with a view to an assessment of a partial loss.

C. G. Loring and F. C. Loring, for the plaintiff.

Fletcher and Peabody, for the defendants.

By Court, SHAW, C. J. The only question in the present case, is whether the plaintiff is entitled to recover as for a total loss. Here the policy on the ship being on time, at all places at sea and in port, and in all employments, no question can arise respecting loss of voyage or of any particular employment or adventure, circumstances which have sometimes been complicated with other considerations in determining whether a particular disaster constituted a total loss. Another distinguishing characteristic of the present case is, that one of the owners and assured was himself master of the vessel, so that all question whether the master acted within the scope of the authority given by the owners, or conformed to the orders, and acted for the interests of the owners, is precluded.

The argument having turned upon all the questions, as to the rights of the parties, on the facts stated in the report, rather than confined to the particular points ruled at the trial, we have followed the same course.

In the first place, we think it perfectly clear, that the master, supposing him not to have been a part owner, and to have had no authority except that implied authority forced upon him as master, was not authorized to sell the vessel, so as to divest the property and leave nothing to abandon.

The principles upon which this implied authority is founded,

and regulated and controlled, have been so fully discussed and considered in a series of recent cases, that it is sufficient to refer to them: *Gordon v. Mass. Fire and M. Ins. Co.*, 2 Pick. 249; *Hall v. Franklin Ins. Co.*, 9 Id. 466; *Winn v. Columbian Ins. Co.*, 12 Id. 279; *Bryant v. Commonwealth Ins. Co.*, 13 Id. 544.

Here was not that imperious, uncontrollable necessity for a sale, which is requisite to confer such an authority on a master. Indeed there was scarcely any necessity, or expediency, other than to charge the underwriters, and close the concern.

The vessel struck and was injured on the Carysford reef; but she was got off, proceeded with part of her cargo to Key West, without repairs, proceeded thence to Mobile, her port of destination, discharged her cargo, and there remained at a wharf, in the possession and under the command of one of the assured, with full and entire power and liberty to dispose of her as he thought best. Mobile is a port and post-town of the United States, from which a communication might have been made to the underwriters, in fifteen or twenty days, either directly by a notice of abandonment, or through the agency of the plaintiff, a resident merchant in Boston. The parties there were all in a situation freely to exercise their legal powers, and stand upon their legal rights, unaffected by any urgent and uncontrollable necessity, compelling the master to act for the owners. If, then, the claim for a total loss, stood alone upon the fact of the sale, on the ground, that such a sale was authorized by the exigencies of the case, and that thereby the property of the owners was rightfully and legally divested, it is very clear, that it could not be maintained. Indeed it is not mainly contended for on the part of the plaintiff. But it is alleged as a circumstance distinguishing this from the former cases, that here was a damage, by one of the perils insured against, so extensive, that if repaired, the cost would be so great, that the amount to be paid by the insurers, after the deduction of one third new for old, would exceed half the value of the vessel, when repaired. The plaintiff offered evidence to prove this fact, which was rejected as insufficient to support the claim if proved, and therefore, for all the purposes of this argument, it is to be taken that such was the fact.

The argument then on the part of the plaintiff stands thus: that damage to the ship by one of the perils assured against, to more than half the value, is, of itself, a substantive technical total loss, which will constitute a legal total loss, if followed by a seasonable notice of abandonment; that when such notice

of abandonment is given, it relates back to the acts constituting a total loss; that from the occurrence of a constructive total loss, the master becomes the agent of the underwriters, who of course are responsible for his acts; that if he makes an unauthorized sale, under those circumstances, the underwriters and not the assured must abide the consequences, because the master is the agent of the underwriters; that such unauthorized act of the master, goes only to diminish the amount of salvage to which by the abandonment the underwriters are entitled, and can not affect the claim of the assured to recover the whole amount of the underwriters. It is then contended, that here was a constructive total loss, that there was sufficient and reasonable notice of abandonment, and that this throws the responsibility of the intermediate acts of the master, including the unauthorized sale, upon the underwriters.

The principle upon which this argument is founded, is, as a general rule, correct, but it must admit of some exceptions and qualifications. And we think the rule does not apply in the present case, to throw the responsibility of the unauthorized sale upon the underwriters, for several reasons.

First, because, though the rule is applicable in a case where the master is a stranger, both to underwriters and the assured, except so far as the relation of agent is created by the nature and duties of the office he holds, yet it is not applicable where the master is himself the assured, and does the act assumed to be unauthorized; and secondly, because here was no sufficient right of abandonment, at the time the notice is supposed to have been given, and no sufficient notice of abandonment, for the cause now insisted on, to support the claim for a total loss.

The first of these objections is founded upon the peculiar circumstance in the present case, that the master who made the sale was himself one of the owners and assured. The objection stands upon two grounds; one is, that a man can never aver his own unauthorized act, or other misconduct, as the foundation of a claim of right in himself; and secondly, that if he had acted merely in pursuance of his supposed agency as a master, and from necessity, the owners might, as against the vendee, aver and show that there was no such necessity, that of course there was no such authority to sell, and of course that the property was not divested, and upon an abandonment the same right would be transferred to the underwriters, who might reclaim the vessel specifically and thereby avoid the consequences of

such a sale; and the loss arising from it. But where a master stands in a double capacity, in one of which, namely, as master, he has no authority to make a sale, and in the other, as owner, he has such authority, and makes a sale, in whatever right or capacity he might profess to act, his act would take effect according to his authority. Being therefore owner, and as such having a right and power to sell, and being unauthorized to make a sale as master, his interest as owner would pass to the vendee, and he would thereby be incapacitated from making an effectual abandonment of the same interest and title to the underwriters. This very case is put by Parker, J., in delivering the opinion of the court in illustration of the general rule, that to make an effectual abandonment, the assured must have the power of transferring the subject at the time of the abandonment. In truth, it is the same as if the plaintiff, after capture and recapture of his ship, had thought fit, not from necessity, to sell her; in which case he could claim nothing of underwriters, but an indemnity for her diminished value, in consequence of the peril insured against: *Higginson v. Dall*, 13 Mass. 102.

It seems, therefore, if this view of the case is correct, that if Tyler, the master, had been the sole owner, and made the sale under these circumstances stated, he would have been precluded from setting up such unauthorized sale, as the foundation of a claim, and the plaintiff having averred the insurance to be made on account of the owners and alleging the interest in them, would have stood on the same ground. Can the plaintiff then, in this action, distinguish between the interests of Waldo Peirce and Robert Treat, the other two owners, and that of Andrew Tyler, the master, and recover as for a partial loss upon one of those interests, and a total loss upon the two others?

The averment in the declaration is of an interest in the three jointly, without alleging whether they were partners or tenants in common, and if tenants in common, in what proportions they were severally interested. Upon this declaration, therefore, as it stands, the interest of the parties as averred was a joint interest; they acted jointly in the claim, and there is nothing to show a several interest in the three persons respectively.

But the court are strongly inclined to the opinion, that upon another ground the other two owners are bound by the act of Tyler in making the sale, and that is, subsequent ratification. The owners joined in a claim upon the underwriters, in which they set forth the sale of which they seem jointly to have received

and credited the proceeds, and if they have ratified the sale, it has the same effect as if there had been a previous authority. If there was a previous authority or subsequent ratification, then the case stands on the same footing, as if Tyler had been the sole owner, and no form of claiming or declaring on the claim, could make any difference.

But it is of less consequence to consider whether, upon further averments and proofs, a better case could be made for the plaintiff, if the other part of the case is decisive.

It is a well-settled rule, that upon a mere constructive total loss, there can be no recovery without an abandonment on the part of the assured; that the right to abandon is a privilege which the assured may exercise or not, at his option; and whether the loss exceed or fall short of half the value, the assured, without abandonment, may always recover an indemnity according to the full amount of his actual loss proved. This rule is applicable to all cases, but the reason of it is peculiarly obvious where the ship remains *in specie*, accessible to the parties, and where the only ground of constructive total loss is damage requiring repairs to more than half the value.

Without adopting the opinion given at the trial, that this abandonment was insufficient, because not in writing, an opinion which perhaps may require further consideration, the court are all of opinion, that here was no sufficient abandonment, upon several grounds.

It is stated in the report, that in order to prove an abandonment, the plaintiff proposed to offer evidence to show that about the thirteenth of May, when the facts became known in this city, and the papers arrived, the plaintiff called at the office of the defendants, with the protest and other usual documents, to prove the loss, and a statement of the loss, made up by an insurance broker, and demanded payment of a total loss.

The statement thus presented, purported to be the statement of a claim for salvage loss on the vessel, incurred in consequence of getting on the Florida reef, on her voyage from New York to Mobile, at which latter place she was surveyed, condemned, and sold for the good of all concerned. It then charges the value of the vessel, and credits by way of salvage, the proceeds of the sale of the vessel, first deducting all charges.

The first objection is, that here is no abandonment in point of fact, no relinquishment of the vessel or of any interest in the vessel, but on the contrary, the claim proceeds on the basis

of affirming the sale made at Mobile and treating it as a valid sale. Then the principle already alluded to, applies, that by making a sale, in fact unauthorized, they had incapacitated themselves from making a valid abandonment of the vessel, and could only therefore claim for a partial loss.

But if this is considered as putting too harsh a construction upon the act of the plaintiff, and it must be considered that his object was to present the state of facts to the underwriters, and to claim according to the legal rights of those whom he represented, it may be proper to examine this proceeding further.

It is obvious, that the plaintiff himself not being the owner of the vessel, and having no power of disposing, had no capacity to abandon, except in virtue of an authority derived from the owners. Perhaps, however, in the absence of proof, he being the agent of the owners to insure, his agency might be presumed for this purpose, if there were no other ground of objection. Now supposing, for the purpose of the argument, that the plaintiff was duly authorized to abandon, and that a parol abandonment was valid, still though no particular form of abandonment is necessary, yet in substance it must be positive and absolute, not fettered by contingencies, conditions, or limitations, and must, in express terms or by necessary implication, import an actual present relinquishment of the interest or subject-matter to which the abandonment applies, and must truly state the reasons or grounds upon which the abandonment is made and a total loss claimed.

A question has been made, whether a claim for a total loss does not necessarily imply an abandonment. It is difficult to answer a question thus nakedly presented. Upon principle it would seem, that a mere claim for a total loss does not necessarily imply an abandonment, because in some cases a total loss may be recovered without abandonment: *Idle v. Royal Exch. Ass. Co.*, 8 Taunt. 755. But commonly a claim for a total loss will be accompanied by a statement of facts and circumstances, by the reasons and grounds of claim upon which the assured proceeds, and such statements of the grounds of claim may perhaps carry as plain an implication of actual abandonment as could be done by express words: though it was stated by Lord Ellenborough, that an implied parol abandonment is too uncertain, and can not be supported: *Parmeter v. Tbdhunter*, 1 Camp. 541.

But without considering other objections to this proceeding as an abandonment, there is one which goes to the merits, and

is decisive. It has already been mentioned as a requisite to a good abandonment, that it must state the reasons and grounds upon which a total loss is claimed.

The underwriters ought to be informed by the assured, who alone know the fact, of the nature of the constructive total loss, upon which the claim is made, that they may judge whether they will accept the abandonment, and that they may forthwith take the necessary measures which such an acceptance would render necessary and proper. And the assured can not avail himself of any other ground than that stated by him at the time of abandoning. The ground must be stated with sufficient certainty to enable the underwriters to decide whether they will accept the abandonment. If the ground stated is insufficient, they will be justified in refusing to accept it, and if there be another ground sufficient in fact, but no notice of it communicated to the underwriters, it is ineffectual to found a claim for a total loss, as if no abandonment at all had been made: *Suydam v. Mar. Ins. Co.*, 1 Johns. 181 [3 Am. Dec. 307].

In the present case the only act relied upon as constituting an abandonment by the plaintiff, was the presentment of the claim in writing as for a total loss, upon the ground of damage done to the vessel on the Florida reef, and of her being afterwards surveyed, condemned, and sold, "for the good of all concerned." If this can be considered an abandonment by implication, it was not because the vessel had been so damaged as to require repairs to more than half her value, but for another and different reason, namely, because she had been condemned and sold. Upon this latter ground there was clearly no right to abandon, for the reasons before mentioned, and the underwriters were therefore right in rejecting the abandonment. Had the abandonment been made on the ground that the vessel had gone into Mobile, requiring repairs to more than half her value, the underwriters would have known that as this abandonment was founded on a cause which preceded the sale, it would take effect so as to vest the property in them from the time of the happening of the cause on which it was founded, and if the sale was not made upon such necessity as to warrant it, it was void, and they could reclaim the property.

The court are therefore of opinion, that if the plaintiff could now prove a substantive ground of total loss from damage to the vessel, requiring repairs to more than half her value, on her arrival at Mobile, and before the sale, which might have warranted an abandonment upon that specific ground, so as to

throw the responsibility of the master's unauthorized acts, including the sale of the interest of the two other part owners, upon the underwriters, still there was no abandonment upon that ground or for that reason; the abandonment, therefore, did not relate back to a period anterior to the sale, so as to warrant the two other part owners in repudiating that sale, and throwing the responsibility and the consequences of it upon the underwriters, if upon other grounds they might have done so.

MASTER IS AGENT FOR OWNER OR INSURER, WHEN, and question how determined: See *Dickey v. American Insurance Co.*, 20 Am. Dec. 763.

MASTER'S AUTHORITY TO SELL HIS VESSEL.—There must be a pressing necessity to authorize a master to sell his vessel, and whether such necessity exists, depends upon the particular circumstances of each case: *Fitz v. The Galliot Amelle*, 2 Cliff. 445. Impossibility of raising funds otherwise is no ground for selling where the vessel has reached her destination after an injury to less than half her value, where the owner is present: *Allen v. Commercial Ins. Co.*, 1 Gray, 158. If the master can by reasonable means and without extraordinary delay communicate with the owner and afford him an opportunity to raise the necessary funds, he can not sell: *Stephens v. Pacific etc. Ins. Co.*, 7 Allen, 235; all citing the principal case.

INJURY TO MORE THAN HALF THE VALUE of the vessel when repaired constitutes a technical total loss authorizing an abandonment: *Dickey v. American Ins. Co.*, 20 Am. Dec. 763; *Abbott v. Broome*, 2 Id. 187; *Hyde v. Louisiana State Ins. Co.*, 14 Id. 196. That the insured can not recover for a total loss in case of a constructive total loss is held, citing *Peirce v. Ocean Ins. Co.*, in *Smith v. Manufacturers' Ins. Co.*, 7 Metc. 451.

ABANDONMENT.—As to what is sufficient cause for an abandonment, and as to how the right may be exercised or waived, see *Bosley v. Chesapeake Ins. Co.*, 22 Am. Dec. 337, and other cases in this series collected in the note thereto. See also *Thompson v. Mississippi M. & F. Ins. Co.*, Id. 129 and note. The principal case is referred to and distinguished in *Heebner v. Eagle Ins. Co.*, 10 Gray, 138, on the point as to what is sufficient to constitute an effectual abandonment. That case was said to differ from *Peirce v. Ocean Ins. Co.*, for the reason that there was there an explicit transfer and relinquishment of all the assured's right and interest in the vessel.

WIGGIN v. SUFFOLK INSURANCE COMPANY.

[18 PICKERING, 145.]

PARTY HOLDING TWO POLICIES OF INSURANCE ON THE SAME PROPERTY, executed by different companies on the same day and for the same amounts, and together exceeding the amount at risk, may recover a proportionate part of a loss from each company, or may recover the whole amount from either, and leave that company to seek contribution from the other.

WHEN THE INSURED ACCEPTS ONE HALF THE LOSS from one of such companies, after deducting certain set-offs, he will be deemed, *prima facie*, to have elected to adjust the loss against the other upon the same basis.

ASSIGNMENT OF A POLICY ASSENTED TO BY THE INSURERS by a memorandum reserving to themselves all rights expressed therein "regarding premium notes, debts, etc.," where by the terms of the policy such assent is made necessary to an assignment, entitles the insurers to deduct from a loss payable to the assignee all premium notes and other debts then due them from the assignor, which, according to the provisions of the policy, they might have deducted if there had been no assignment.

WHERE A LOSS IS ALREADY DUE THE ASSIGNOR ON A PREVIOUS POLICY from the same insurers, containing similar provisions as to deductions, which policy has never been assigned, all indebtedness due from the assignor to the insurers must be first deducted from that loss, leaving the balance only to be applied to a loss accruing on the policy subsequently executed and assigned.

SUM DUE ON A BOTTOMRY BOND EXECUTED BY THE ASSIGNOR of a policy to the insurers, may be deducted from a loss payable to the assignee who has taken the assignment subject to debts due the insurers from the assignor, without first resorting to the mortgaged vessel or the sureties in the bond.

CREDITOR HAVING A LIEN ON TWO DISTINCT FUNDS may, in a court of law, resort to either, although other persons may have subsequent claims, so that his election may benefit one in preference to another.

ASSUMPSIT on a policy of insurance in favor of Barrett & Brown, of which the plaintiff was assignee. The policy contained a provision that in case of a loss "all sums due to the company from the insured when such loss becomes due," should be deducted before paying such loss. One question was as to the right of the defendants to deduct from the amount due on the policy six premium notes due them from Barrett & Brown, the assignors of the policy, and also a sum due on a bottomry bond dated prior to the assignment executed by Barrett & Brown as principals, with certain sureties to secure a loan of eight thousand dollars on bottomry of the bark Kent. The other facts appear from the opinion, so far as they are material to the points decided. Verdict for the plaintiff, by consent, for ten thousand five hundred dollars, subject to the opinion of the court as to whether it should be increased or reduced.

C. P. Curtis and B. R. Curtis, for the plaintiff.

Parsons and Stearns, for the defendants.

By Court, SHAW, C. J. It appears, in the present case, that two policies were made on property on board the brig Soule, from Boston to Antwerp, in behalf of Barrett & Brown, bearing date the same day, one by the defendants and one by the American insurance company, each for the sum of ten thousand dollars. The property at risk amounted to the sum of seventeen thousand one hundred and eighty-five dollars and

nineteen cents. Both policies therefore together exceeded the amount of risk, by nearly the sum of three thousand dollars.

By the terms of both policies, they being in the form now in use in the city of Boston, it was stipulated that the policy should not be held to cover any risk already covered by a prior policy; and that the policy, so far as it covered risks not already covered by any prior policy, should not be considered as in any respect affected by any subsequent policy. Had it appeared, therefore, by the facts in the present case, that the policy at the American insurance office was made prior to the present, this would, by force of the above clauses, have been available as a substantive contract of assurance for the amount of seven thousand one hundred and eighty-five dollars and nineteen cents only, being the balance of interest not covered by the prior policy. Or had it appeared, that the policy at the American insurance office was taken after the present, this would have stood as an available insurance to its amount, ten thousand dollars. And being of the same date, it would have been open to proof which was in fact executed first, so as to give effect to these clauses in the policies. But no such proof has been offered, and no fact is stated in the report from which any priority can be inferred; on the contrary, the two companies have agreed between themselves to consider and adjust them, as if made simultaneously, and we consider that the argument has proceeded on the same ground, without objection on the part of the plaintiff.

Treating these policies then as in fact made at the same time, the clause in regard to priority is wholly inoperative, and then as to the amount of the difference between the sum insured and the sum at risk, it is the case of a double assurance, that is, the assured has an obligation from two or more parties to perform the same thing, at the same time. When this is the case, the party holding such double assurance, may in the outset, and before making any election, consider each debtor as liable to bear a proportionate part of the common burden, and recover accordingly; or he may require either of the parties liable, to pay the whole, and then it follows as a rule of law, founded upon the broadest principles of equity, that where one of two parties has paid the whole of a debt, for which each was originally and ultimately liable, the party who has paid the whole or a disproportionate part of the common debt, shall have a remedy against the other for a contribution, so that the

burden may be borne equally according to their respective liabilities.

In the present case, it appears, that the plaintiff is the assignee of both policies, that suits were commenced on both policies, and entered in court, by the plaintiff at the same time: *Wiggin v. American Ins. Co.*, 18 Pick. 158. It further appears, that both the defendant companies claimed certain deductions by way of payment or set-off, that the American insurance office, in the suit against them, considering that they were liable for half the actual loss, and not contesting the right of the plaintiff to claim what was actually due as between them and Barrett & Brown, the original party assured, but claiming certain deductions, made an estimate of the amount actually due, by charging themselves with one half of the actual loss, and making deductions to a certain amount, struck a balance, and paid into court the sum of four thousand three hundred and forty-five dollars and twenty-eight cents, computed upon that basis; and the plaintiff took the money out of court. The plaintiff being the assignee of both parties, it does not appear that it can make any difference to him, whether he elects to take one half of the amount which he is entitled to recover from each office, or ten thousand dollars from the one, and seven thousand dollars from the other. Under the circumstances of the case, therefore, we consider the taking the money out of court, as *prima facie* evidence, that the plaintiff acceded to the proposal of the two companies to consider each as responsible for one half of the sum actually at risk, and made his election accordingly to adjust the loss in the present case upon that basis.

If it is otherwise, if there is any mistake on this point, which the plaintiff wishes to have more fully considered, judgment must be suspended until the parties can be further heard.

Considering then that the defendant company are liable on their policy for one half the amount at risk, say eight thousand five hundred and ninety-two dollars and fifty-nine cents, with interest to be computed, then the material questions controverted between the parties arise, what sums the defendant company have a right to deduct, in order to ascertain the balance due. In the first place it is proper to consider the contract between the parties to this suit. Had it been a mere assignment in equity, the suit must have been commenced in the name of Barrett & Brown, and all equitable deductions would have been made. But besides the general rule of law, that an assignment of a chose

in action can not be made at law, so as to enable the assignee to sue in his own name, there is a clause in the policy, which prohibits the assured from assigning the policy without the consent of the underwriters. The consent of the defendant company in the present case was essential, to enable the plaintiff to maintain his action, and that being given upon terms, by his acceptance of it the plaintiff assents to and becomes bound by the terms. The policy was made in February, 1834, assigned to the plaintiff in June, 1834, and the defendants assented to it by a memorandum in writing, "reserving to themselves all the rights expressed in the policy, regarding premium notes, debts, etc." The plaintiff, by assenting to these terms, agreed that all debts due to the office should be deducted from the amount due on this policy. The substantial effect of such an assignment under such a reservation is, that the defendants promise to pay the plaintiff the same amount, which but for the assignment would be payable to Barrett & Brown. The effect is nearly if not precisely the same as the assignment of a chose in action, without the express concurrence of the debtor, but with notice to him, which effect would be, that the assignee must sue in the name of the assignor, that all equitable payments, set-offs, and deductions, which the debtor might make as against the assignor, may be made, but that any release or discharge given by the assignor after notice of the assignment will not avail, and any debt contracted after such notice can not be set off. By the particular terms of the reservation made by the defendants, in their assent to this assignment, we were at first rather inclined to the opinion, that small premium notes, taken in the ordinary course of business and in good faith, before any failure on the part of Barrett & Brown, might be deducted; but this applies only to two small notes subsequent to the assignment, one for one hundred and fifty-eight dollars, dated September, 1834, and one for one dollar, dated October, 1834, and as to these the question becomes wholly immaterial, upon the considerations hereafter stated.

The assignment then was made by the assured, with the assent of the defendant company, and accepted by the plaintiff, reserving all rights expressed in the policy regarding premium notes, debts, etc. By the terms of the policy, the defendants, on the happening of a loss, and in liquidating it, were to have a right to deduct from it, all premium notes and other debts due to the office. But, supposing that this reservation should be construed strictly, and be limited to all debts,

which should become due, in virtue of contracts and engagements then entered into, and dealings then had, it appears by the statement of facts, that in virtue of two policies made prior to this assignment, there was a loss due from the defendant company to Barrett & Brown. On the liquidation of that loss, the defendants had a right, by the terms of the policies, to deduct all premium notes due to the office, as well those afterwards as those previously made. And neither the plaintiff nor any other person having had an assignment of those policies, there was nothing to interfere with the general right of the defendants, as against Barrett & Brown, to deduct their premium notes from that loss.

We consider then, that the effect of this assignment was to make the defendants liable to the plaintiff for any loss which might occur, on the policy on property shipped by the brig Soule to Antwerp, first deducting any premium notes or debts due to the office, in virtue of contracts then subsisting. But in order to ascertain what those debts are, we think the defendants are bound to give credit for all sums due to Barrett & Brown, growing out of the same dealings, and that the balance only is the debt due, and that the plaintiff is entitled to have those credits given to Barrett & Brown in order to reduce the debt, which by the reservation they have a right to deduct from the policy assigned to him.

It appears that there is due to Barrett & Brown, from the defendant company, the sum of four thousand nine hundred and ninety-five dollars and five cents, for partial loss and general average on the Kent. From this sum is to be deducted notes Nos. 1 and 2, for premiums on the same policies; also the four other premium notes, because, though given after the policies on the Kent, yet by the terms of those policies the defendants, on liquidation, were to deduct all premium notes, past and future, and there was no assignment to any third person to interfere with this general right.

The balance, thus ascertained, of the loss due from the defendants to Barrett & Brown, is then to be deducted from the amount due to the defendants by Barrett & Brown on the bottomry bond.

This leads to the most important question in the cause, which is, whether the defendant company have a right to set off the amount due to them on the bottomry bond, against the claim of the plaintiff in this action; and the court are all of opinion, that they have this right. This bottomry bond was dated, not

only before the assignment, but before the policy now sued upon was made. It comes, therefore, within the terms of the reservation. It was a debt due by Barrett & Brown, as principal debtors, to the defendants. The argument on the part of the plaintiff is, that the defendants had two other remedies for this sum, to which they should first have resorted, namely, the mortgage on the ship, and the sureties on the bond, who are proved to be solvent. But we think that these were mere collateral securities and remedies, to which the defendants might, but were not bound to resort. Where a creditor has a lien on two distinct funds, he may resort to either, although other persons may have subsequent claims, so that his election may benefit one in preference to another. A court of law will not oblige a creditor so to marshal his claims, as to charge one fund and release another, where both are liable: *Lupton v. Culler*, 8 Pick. 298; *Union Bank v. Laird*, 2 Wheat. 390. But this case stands somewhat stronger than that of the right of a creditor to elect, among different securities, to which he will look. The plaintiff took this assignment subject to the debts due from Barrett & Brown to the office; this was a debt due on a bond then existing, and which afterwards became payable; and, therefore, by the terms of his assent to the assignment, the defendants had a right to deduct this debt, without first resorting either to the mortgage on the vessel, or to the sureties on the bond.

CREDITOR HAVING RESORT TO TWO FUNDS—MARSHALING ASSETS: See *Jones v. Zollicoffer*, 11 Am. Dec. 795 and note.

VAN DEUSEN v. BLUM.

[18 PICKERING, 229.]

COUNTS IN DEBT OR ASSUMPSIT ON A QUANTUM MERUIT or *quantum valebat*, may be joined in the same declaration with counts on a specialty.

SEALED CONTRACT, EXECUTED BY ONE PARTNER in the name of the firm without previous authority or subsequent ratification by his copartner, does not bind the latter.

SUCH PARTNERS ARE LIABLE ON A QUANTUM MERUIT and *quantum valebat* for labor and materials furnished to the firm before its dissolution in attempted execution of such invalid contract, it being for a purpose within the scope of the partnership, though the work is not completed until after the dissolution.

DEBT, the declaration containing two counts on a sealed contract and two counts on a *quantum meruit* and *quantum valebat*

for labor performed and materials furnished. The defendants, Blum and Thouvenin, were partners prior to November 10, 1832, when the partnership was dissolved and all the property conveyed to Blum, who agreed to pay the debts. The contract declared on was executed under seal by the plaintiffs, and by Blum in the name of his firm. There was no evidence of any authority or ratification by Thouvenin, who alone appeared and pleaded *non est factum* and *nil debet*. The contract was for the building of a certain bridge, a purpose within the scope of the partnership business. The judge excluded the contract as evidence, but permitted testimony to be introduced, upon the third and fourth counts, showing the value of the labor and materials furnished in constructing said bridge before the dissolution of the partnership, though it was not completed until afterwards. Verdict for the plaintiffs for labor and materials furnished before the dissolution. The questions arising upon these facts reserved for the whole court.

Dwight, Byington, and Tucker, for the defendant.

Bishop and Sumner, contra.

By Court, MORRIS, J. Debt, as well as assumpsit, will lie on a *quantum meruit* or a *quantum valebat*: 1 Chit. Pl. 107; 2 Williams' Saund. 117 b,¹ note; *Union Cotton Manufactory v. Loddell*, 13 Johns. 462. Hence these counts may well be joined with counts upon a specialty: *Smith v. First Cong. Meeting-house in Lowell*, 8 Pick. 178.

It was long doubted, whether a man, who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another, must make reasonable compensation for the same: *Hayward v. Leonard*, 7 Pick. 181 [19 Am. Dec. 268]; *Smith v. First Cong. Meeting-house in Lowell*, 8 Id. 178; *Munroe v. Perkins*, 9 Id. 298 [20 Am. Dec. 475]; *Brewer v. Tyringham*, 12 Id. 547.

The general authority derived from the relation of partnership, does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose: see *Cady v. Shepherd*, 11 Pick. 400 [22 Am. Dec. 379],

1. *Coryton v. Lithby*.

and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm, might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them.

Judgment on the verdict.

QUANTUM MERUIT ON SPECIAL CONTRACT.—This subject is discussed in the note to *Hayward v. Leonard*, 19 Am. Dec. 268; see also *Britton v. Turner*, 26 Id. 713; *Norris v. School District*, 28 Id. 182; and *Helm v. Wilson*, Id. 336 and notes thereto, referring to other cases in this series. *Van Deusen v. Blum* is referred to in *Williams v. Bemis*, 108 Mass. 93, as an authority with respect to recovering on the *quantum meruit* for services actually performed under a contract which can not be enforced, by reason of the statute of frauds, or other like impediment, the contract itself not being illegal.

PARTNER CAN NOT BIND COPARTNERS BY A SEALED CONTRACT without special authority: See *Robinson v. Crowder*, 17 Am. Dec. 762, and *Hart v. Withers*, 21 Id. 382, and cases referred to in the notes to those decisions. The principal case is cited in *Russell v. Annable*, 109 Mass. 76, per Wells, J., dissenting, to the point, that the partner who executes a sealed instrument in the name of the firm, without special authority from his copartner, is himself bound thereby.

COLT v. BARNARD.

[18 PICKERING, 200.]

INDORSER OF A NOTE OVERDUE is not liable thereon unless demand is made upon the maker within a reasonable time, and immediate notice of non-payment given to such indorser; so, though the maker is insolvent and has absconded.

ASSUMPSIT by the indorsees against the indorser of a note past due at the time of the indorsement. No demand upon the maker or notice to the indorser of non-payment was proved. It was proved by the plaintiffs that at the time of the indorsement the maker was insolvent, and had absconded, and that

judgment had since been recovered against him in another state, which was still unsatisfied.

Gold, for the plaintiffs.

Hubbard and Lanckton, for the defendant.

By Court, SHAW, C. J. It is now conceded, that this note was indorsed by the defendant to the plaintiffs, some time after it became due, and the question is, whether the action can be maintained against the indorser, without a demand on the promisor and notice of non-payment to the indorser. The court are of opinion, that the action can not be maintained, without such demand and notice.

If the indorser is liable at all, on such indorsement, it is in virtue of the law merchant, which creates a conditional liability to pay, if the maker on presentment shall neglect or refuse to pay, and seasonable notice of such dishonor is given to the indorser. It is very clear, that a promissory note is negotiable after it falls due, as well as before. Each indorsement is in the nature of a new draft, by which the holder orders the maker to pay the contents to the indorsee. It is an implied stipulation with the indorsee, that the money is still due and payable, that the indorser is entitled to so much money, in the hands of the maker, and if the indorsee will call upon the maker he shall receive it. It is like drawing a bill at sight, on which a drawer or indorser can not be holden without presentment and notice of non-payment. All the reasons, which require a demand and notice, in any case, to charge the indorser, apply to this. There is the same reason for prompt notice, namely, that the indorser may take measures to secure payment, if the note is dishonored on presentment.

This precise point, though not decided in this state, has been so decided in other states, by very respectable courts, and upon satisfactory reasons, from analogous cases: *Course v. Shackelford*, 2 Nott & McC. 283; *Poole v. Tolleson*, 1 McCord, 199 [10 Am. Dec. 663]; *Berry v. Robinson*, 9 Johns. 121 [6 Am. Dec. 267]; *McKinney v. Crawford*, 8 Serg. & R. 357; *Bishop v. Dexter*, 2 Conn. 419. If it be asked, at what time payment of the note shall be demanded, the day originally named for payment having passed, the answer is obvious. As between maker and promisee, a note is payable on demand, at any time after it becomes due. When it is indorsed after due, it is in legal effect a note on demand, and is to be so understood by the parties, as if written "on demand." In that case, the law is well set-

tled, the demand must be made within reasonable time, and if not paid, immediate notice of non-payment must be given to the indorser: *Field v. Nickerson*, 13 Mass. 131.

No notice having been given to the indorser in the present case, although the note was indorsed after it became due, the action can not be maintained.

INDORSER OF A NOTE ALREADY DUE IS ENTITLED to have seasonable demand made on the maker, and due notice of non-payment given to himself before being held liable thereon: *Berry v. Robinson*, 6 Am. Dec. 267; *Poole v. Tolleson*, 10 Id. 683; *Esfert v. Des Coudres*, 12 Id. 609 and note; *Hill v. Martin*, 13 Id. 372; *Nash v. Harrington*, 16 Id. 672. And the note will be treated as if indorsed on the day of payment for the purpose of demand and notice: *Nash v. Harrington*, *supra*. That an indorsee of an overdue note takes it subject to all equitable defenses in favor of the maker, see *Johanson v. Bloodgood*, 1 Id. 92; *Sargent v. Southgate*, 16 Id. 409; *Robinson v. Lyman*, 25 Id. 52 and note. But the purchase of a note already due does not *per se* charge the purchaser with notice of his vendor's want of title: *Proctor v. McCall*, 23 Id. 135.

CHAMBERLIN v. SHAW.

[18 PICKERING, 273.]

OWNER OF SHEEP IS PRIMA FACIE OWNER OF THE WOOL produced therefrom.

LESSEE OF SHEEP HAS NO PROPERTY IN WOOL, WHEN.—Under a lease of a farm and a number of sheep “to hold one year from the first of April, 1833, reserving five hundred and fifty pounds of wool of a quality of an average with the flock,” providing that the sheep are not to be counted to the lessee till after shearing in June, 1833, and are to be counted back after shearing June, 1834, the lessee to take the risk of the sheep until then, the lessee has neither the general nor special property nor legal possession of the sheep from April to June, 1834, but only a right to enter and shear them, and is not the owner of any part of the wool until the lessor's share is separated.

LESSEE'S RIGHT TO THE WOOL RESTS MERELY UPON AN EXECUTORY CONTRACT until the lessor's share is separated.

OWNER OF THE SHEEP MAY MAINTAIN TROVER against the lessee and a purchaser from him for a joint conversion of the wool before separation, where, both being together, and in possession, refuse to deliver it on demand, without showing that the purchaser had notice of the invalidity of the lessee's title.

MEASURE OF DAMAGES IN SUCH AN ACTION is not the value of all the wool, but only of the share that would belong to the plaintiff after separation.

TROVER for a quantity of wool against Ebenezer and Oushing Shaw, the former of whom suffered a default, and the latter appeared and pleaded the general issue. It appeared at the

trial that the plaintiff had leased to Ebenezer Shaw, by a lease not under seal, a certain farm, and the sheep thereon, "to hold one year from the first of April, 1833, reserving five hundred and fifty pounds of wool of a quality of an average with the flock," no other rent being provided for, the sheep not to be counted to the lessee till after the shearing in June, 1833, and to be counted back to the lessor after the shearing in June, 1834, the lessee to take the risk until then, and make good any deficiency. The wool of the shearing for the summer of 1833 was taken by a prior lessee. Ebenezer Shaw sheared the sheep in June, 1834, and sold the wool to Cushing Shaw. The plaintiff's agent demanded five hundred and fifty pounds of it from the defendants, under the lease, they being together, and Cushing Shaw having the wool in his possession, and being on his way home with it, but a delivery was refused. The judge ruled, against the defendant's objection, that the plaintiff could maintain the action, but that he could recover only the value of five hundred and fifty pounds, and not the value of all the wool, which he insisted was the real measure of damages. Verdict for the plaintiff, assessing the damages according to this ruling. The question submitted to this court was, whether upon these facts there should be judgment on the verdict, a new trial, or a nonsuit.

Marsh, for the plaintiff.

Alford, for the defendants.

By Court, SHAW, C. J. (after stating the facts). It is to be regretted, that, in a case where the rights of the parties, in point of law, must depend upon the construction of the instrument of lease, where every clause and stipulation is important to determine the exact meaning of the parties, the instrument itself can not be produced. But it unfortunately happens, without the fault of any body, as far as appears, that neither of the two parts of the instrument can be found, and that we are obliged to decide upon such imperfect statement of the instrument, as the recollections of counsel can supply.

In the first place, it was contended, on the part of the defendant, that the plaintiff had no property in the wool, until the separation of the five hundred and fifty pounds, and as no such separation was ever made, his right of property did not accrue. This leads us to the question, who was the general owner of the wool before separation? The general rule is not contested, that the owner of cattle or stock is, *prima facie*, the

owner of all the proceeds and profits and products thereof. But it was contended, that the defendant, by virtue of the lease, became owner, with a special property for the time being, and therefore he was the owner of the wool as its product. The first result of this argument would be, a claim to the wool, the product of the shearing of June, 1833, because at that time he was lessee of the sheep. But it would be absurd to contend, that under a lease for one year he could claim two annual crops. But then it is contended, and this is the strongest view of the case for the defendant, that although this was in terms a lease of both the farm and sheep, commencing and ending with the first of April, yet taking the whole instrument together, and taking also the well-known physical fact, that a crop of wool, the growth of the preceding year, can not, in our climate, be taken on the first of April, but must be postponed to June, it may be sustained as a lease of both for a year; that of the farm to commence on the first of April, that of the sheep at the shearing in June.

But on consideration, this view seems not admissible; the farm and the sheep are included in the same sentence, followed by the words "to hold for the term of one year." Further, the lessee was to take charge and possession of the sheep, find and keep them from the first of April, and the owner and landlord was to resume the possession at the same period, the ensuing year. The instrument is brief and does not go into details. It would seem to be a very forced construction of it, to suppose that the sheep were to be kept anywhere else than on the farm thus let. Then if the farm was to be relinquished on the first of April, it follows inevitably, that the possession of the sheep was to be given up at the same time. The provision, that the sheep were to be counted out to Shaw, after shearing in June, and by him back to the landlord, after shearing the following June, if it stood alone, might countenance the construction contended for; but controlled as it is, by other stipulations, and by the very explicit terms of the leasing clause, it may well enough be accounted for, on the supposition, that this was to fix the time at which the lessee's undertaking to bear the risk of the sheep was to commence and terminate. We think then, that the relation in which Shaw stood to the sheep, from April to June, 1834, was this: he had neither the general nor special property in them, nor the legal custody or possession, but he had a right by implication, to enter at a suitable time to shear them, and count them out to

the owner, in discharge of his undertaking to be responsible for their number. But having neither general nor special property, his entering under a right in nature of a license and shearing the sheep, would not make the wool his property; that would follow the ownership in the sheep which produced it.

It may be asked, how Shaw was to hold any property in the wool. Amongst the express terms of the instrument, there is no provision that he shall have any of the wool; but there is such a right by necessary implication. The stipulation, that the landlord is to have five hundred and fifty pounds of the wool, and, as we think, of the wool of that flock, carries a strong implication, that the lessee, who had kept the sheep through the greater part of the year, within which the wool was growing, should have the remainder; and as a necessary incident, that he should have a right to enter and shear the sheep. The implied stipulation on the part of the landlord, that the lessee should have all the wool over five hundred and fifty pounds, was an executory contract, that would vest no property in the lessee, in any part of the wool, until some further act to be done, and that act in the present case was the separation of the five hundred and fifty pounds from the remainder.

The court are, therefore, of opinion, that at the time of the shearing the general property in the whole of the wool was in the plaintiff, and as no separation had taken place, it remained in him at the time of the conversion.

It is then asked, if the plaintiff was the owner of the whole at the time of the conversion, why the damages should not have been assessed for the whole amount. In an action of trover, though the plaintiff's possession of the property has been violated, he waives all claim to damages on account of that violation, and seeks an indemnity only for the loss of his property. Hence it is, that the value of the property at the time of the conversion is *prima facie* the measure of damages. Now, if the case is so situated, that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, as where the plaintiff has a special property, subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt, and the property vests in his assignees, subject of course to all legal liens. The assignees denying and intending to contest the factor's lien, get possession of the goods, and convert them. The factor brings

trover, establishes his lien, and recovers. How shall damages be assessed? If he recover the full value of the goods, he will be responsible directly back to the defendants themselves for a moiety of the value. To avoid circuity of action, why should not damages be assessed to the amount of his lien? He is fully indemnified, the balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit. If the plaintiff is responsible over to a third person, or if for any cause, the defendant is not entitled to the balance of the value, a very different rule would prevail, and justice would require that the whole value of the property should be assessed to the plaintiff: *Green v. Farmer*, 4 Burr. 2214. This is such a case; on a severance, the defendant, Ebenezer T. Shaw, would have been entitled to all over five hundred and fifty pounds, and he transferred his right and interest to the other defendant. The plaintiff is indemnified by a recovery to the value of his five hundred and fifty pounds, and he will be responsible over to no other person. We think, therefore, there is no reason to disturb the assessment of damages.

It was, however, contended, that the plaintiff could not recover in this joint action, because there was no joint conversion; but the evidence shows a sufficient joint conversion. The defendants were both together, and both in possession of the wool, and both refused to deliver the wool on demand. It is admitted by one by his default, and it is proved against the other by the evidence. Nor was it necessary to show that the defendant, Cushing Shaw, had any notice of the invalidity of the title of the other defendant. The plaintiff, having proved his property, and shown a demand and refusal, which is evidence of conversion, has established his case. The defendant, Ebenezer T. Shaw, had no property in himself, and so far from having any power or authority from the plaintiff, the evidence strongly tends to show that his attempt to sell the whole was a manifest fraud on the plaintiff. Having neither title in him nor power from the owner, his contract of sale could confer no title on the vendee.

MEASURE OF DAMAGES IN TROVER: See *Spoor v. Holland*, 24 Am. Dec. 37; *Baker v. Wheeler*, Id. 66; *Pierce v. Benjamin*, 25 Id. 396, and other cases in the American Decisions referred to in the notes thereto. The owner of a special or limited property in a thing can recover for its conversion only to the extent of his interest: *Spoor v. Holland*, 24 Id. 37. The authority of *Chamberlin v. Shaw* for the same doctrine is recognized in *Burt v. Webb*, 32 Mich. 179; *Fowler v. Gilman*, 13 Metc. 268; *Clark v. Wilson*, 103 Mass. 222; *King v. Bangs*, 120 Id. 515.

SANDERSON v. WHITE.

[18 PICKERING, 323.]

STATUTE OF 43 ELIZ. IS IN FORCE IN MASSACHUSETTS, so far as to determine what gifts are to charitable uses.

GIFTS TO CHARITABLE USES ARE HIGHLY FAVORED in law, and where a literal execution is impracticable or inexpedient in whole or in part, they will be carried into effect so as to accomplish the general purpose of the donors, so far as that purpose can be ascertained and as nearly as circumstances will permit.

HEIRS OF THE DONOR CAN NOT, BECAUSE OF NEGLECT, misapplication of funds, or other breach of trust, in such cases, call upon a court of equity to declare a resulting trust in favor of themselves, and no beneficial interest accrues to them from a non-execution of the trust.

TRUSTEES OF A CHARITABLE BEQUEST MAY BECOME INCORPORATED, though the will does not expressly provide for their incorporation, where the object of the gift is in its nature lasting, and it is obviously in accord with the testator's intention that there should be perpetual succession.

HEIRS OF THE FOUNDER OF AN ELEEMOSYNARY CORPORATION have no visitatorial power where the trustees are not themselves objects of the donor's charity and are vested by the founder with a general control, superintendence, and management of the trust, which in effect gives them the power of visitors; as where a sum of money is bequeathed to certain trustees and their successors, who afterwards become incorporated, in trust, to invest the same in such secure manner as they shall think best, and to apply the income to the pay or maintenance of a faithful and competent instructor in a certain school to be established by them, for pious and indigent youth, and authorizing the trustees and their successors "to make from time to time such rules and regulations as they may believe best adapted to insure success."

BILL BY THE HEIRS IN SUCH A CASE TO COMPEL THE TRUSTEES to a discovery as to their investments, and to an execution of the trust, will not lie.

BILL filed by the heirs of Alvan Sanderson, deceased, against his executors and certain trustees under his will, charging that the said trustees, in order to injure the plaintiffs and the beneficiaries of a certain charitable bequest given by the will of the deceased, had refused to account for or to appropriate the fund so given in accordance with said will, and had converted and disposed of a great part of said funds to their own use and to unknown purposes, contrary to the will. The bill prayed a discovery as to the proceedings of said trustees relative to the trust, and that they be compelled to replace the funds which they had misappropriated, and to keep the same invested in the manner provided by the will, and to permit the heirs of the testator to inspect their records and accounts at all seasonable hours. The trust in question arose under a portion of the testator's will, which, after reciting that he felt it his duty to contribute to the

promotion of learning, morality, and piety, and that a building had been erected near his house for the accommodation of youth desirous of improvement, but that the tuition might not be sufficient to pay a qualified instructor, and that "some virtuous and pious youth of genius" might desire to be furnished with charitable tuition, proceeded as follows: "I do, therefore, hereby give, assign, and set over to the Rev. Josiah Spaulding," etc., "my trustees, the one half of said building, together with the land," etc., "to them and their successors forever, in trust as a school-house, and as to the avails of the rest, residue, and remainder of my real and personal estate, goods, and chattels of what kind and nature soever, I give, assign, and set over to my said trustees, in trust to be paid to them or their successors, whom they shall name, by my executors whom I shall hereafter appoint, and to be disposed of for the purpose and in the manner following; that is to say, the said sum, whatever it may be, shall be kept out at interest on good security, or otherwise, in whole or in part, vested, as the said trustees or their successors shall think best, in productive real estate, or in sure and permanent funds, and the interest or annual income shall be applied to the pay or maintenance of a faithful, competent instructor of said school in Ashfield aforesaid; and I hereby request my said trustees to give to said institution an appropriate name, relying on the integrity and faithfulness of said trustees and their successors to make from time to time such rules and regulations as they may believe the best adapted to insure success, always having a regard to virtuous and pious youth of genius, in indigent circumstances," etc. The trustees, it was agreed, had received from the executors a certain amount of property. Some of them having died, the survivors chose others in their places, and, after associating others with them, had become incorporated by the name of "The Trustees of the Sanderson Academy and School Fund." By consent, after demurrer to the bill, the cause was argued on the demurrer taken in connection with the act of incorporation.

Dewey and Grennell, for the defendants.

Wells and Alvord, for the plaintiffs.

By Court, SHAW, C. J. (after stating the facts). In the first place, it is perfectly clear, that this is a gift to a charitable use, and as such, entitled to the protection and subject to all the provisions of law governing gifts to charitable uses. Since the

passage of the act, 43 Eliz., c. 4, it has been an established rule, that all gifts are to be deemed charitable which are enumerated in that statute as such, and none other. That statute expressly includes all gifts for schools of learning, free schools, and scholars of universities. This statute passed before the emigration of our ancestors, and being made by way of declaration and amendment of the common law, has been acted upon in this commonwealth, as far as it was applicable to our state and condition, and as far as our judicial tribunals have been competent in point of jurisdiction to execute and carry its provisions into effect. We consider the statute to be in force here, at least so far as to determine what are gifts to charitable uses: *Morice v. Bishop of Durham*, 9 Ves. 399; S. C., 10 Id. 522. Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish and carry into effect the intent and purpose of the donor; and trusts which can not be supported in ordinary cases, for various reasons, will be established and carried into effect, where the trust is raised in support of a gift to a charitable use. If no executor or trustee is named, in ordinary cases the gift would fail, but in cases of charity the want will be supplied by appointment by a court of equity: *Mills v. Farmer*, 1 Meriv. 55.

But the distinction the most material to the present case is this, that where the purposes of the gift are vague and uncertain, and where the persons are uncertain, the gift will either be declared void for uncertainty, or if the gift and the trustee be sufficiently explicit, but the object of the trust vague and uncertain, it will be declared in ordinary cases a resulting trust for the heirs at law or distributees. But in case of a gift to charitable uses, this will never be done. In all such cases the legacy will be sustained, and where a literal execution may become impracticable or inexpedient, in part or even in whole, it will be carried into effect so as to accomplish the general purpose of the donor, as nearly as circumstances will permit, and as such general charitable intent can be ascertained. From this view of the law governing gifts in trust to charitable uses, it is manifest that no neglect, misapplication of funds, or other breach of trust, will give a right to the heirs at law to call upon a court of equity to declare a resulting trust for themselves, and, of course, that they have no pecuniary or beneficial interest accruing from the non-execution of such a trust. They do not, therefore, stand in the relation of *cestuis*

que trust calling upon the court, as a court of equity, to enforce the performance of a trust in their favor.

Considering, then, that the plaintiffs can not assert and enforce their claim as *cestuis que trust*, the only ground upon which they can sustain their claim is, that the defendants constitute a lay eleemosynary corporation for the carrying into effect a perpetual charity, by the promotion and encouragement of a school for young men of genius, who need the aid of the charitable to assist them in their education; and they rely upon the rule of the common law, that when an eleemosynary corporation is founded by an individual, and no visitor is appointed, the founder and his heirs forever are visitors of common right, and they assert the right to enforce the execution of the trusts of the will of their ancestor, under this claim of the visitorial power.

This rule itself is accurately stated by Lord Holt, in his celebrated judgment in the case of *Philips v. Bury*, 2 T. R. 352. In considering what is the nature of a visitor, he distinguishes between those for public government and those for private charity. "But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore, if there be no visitors appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founders: *Yelv. 65*;¹ *Fairchild v. Gaire*, 2 Cro. 60;² where it is now admitted, on all hands, that the founder is patron, and as founder, is visitor, if no particular visitor is assigned, etc. Further, this visitorial power is an appointment of law, it is an authority to inspect the actions and regulate the behavior of the members that partake of the charity. Now, indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain trustees who dispose of the charity, according to the case in 10 Coke, there is no visitor, because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are subject to the orders and directions of the trustees. But where they who are to enjoy the benefit of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences, there is by law, a visitorial power." This principle has been recognized in many subsequent cases, in England and in this country: *Rex v. Master etc. St. Catherine's*

1. *Yelv. 60.*2. *Cro. Jac. 63.*

Hall, 4 T. R., 233; *Dartmouth College v. Woodward*, 4 Wheat. 660, 674; *Allen v. McKean*, 1 Sumn. 300; 2 Kent Com. (3d ed.) 301.

It may be observed, by way of preliminary remark, that though this may, and probably must, be considered as a rule of law in this commonwealth, there is no practice and no precedent to guide in the application of it, this being, so far as I know, the first instance in which the right of an heir to visit an eleemosynary corporation founded by his ancestor, has ever been judicially drawn in question, either in a court of law or equity. The difference between the condition of heirs in England, where the inheritance descends to the eldest son or brother, and in this country, where it vests in all the children male and female indefinitely, is such as would here render the rule one extremely difficult of application in practice, especially after a considerable lapse of time and many descents cast. The difficulty is well illustrated in the present case, where there are already, in the short period of twenty years, forty or fifty heirs of the donor. The rule, however, seems to have been recognized as in force in this commonwealth, though it did not constitute the judicial decision. In *Murdock, Appellant, etc.*, 7 Pick. 322, Chief Justice Parker says, "by that law the power of visitor of all eleemosynary corporations is in the founder or his heirs, unless he has given the power of visitation to some other person or body, which is generally the case."

If, however, this be the law of the land, it must be so considered and applied, whenever a case is properly presented which requires its application, notwithstanding any practical difficulties attending it, and if such inconveniences are found to be numerous and formidable in practice, the remedy is to be sought in legislative interposition. It is peculiarly the province of the legislature so to amend the laws, from time to time, as to adapt them to such alterations as have been already made conformable to our general policy and state of society, that the rules of law may correspond with each other in one entire and harmonious system. For reasons hereafter given, it is not necessary to express any opinion on this point, in the present case.

Another obvious remark is, that the bequest of the testator was not made to the trustees as a corporation, nor was it provided in terms, that they should ask for, or accept an act of incorporation. Perhaps, however, taking the whole provision together, if it was not distinctly contemplated by the testator,

that the trustees should become incorporated, it was not inconsistent with his purpose, or with the trust reposed in them.

It has already been suggested, that the law goes to a great extent in supporting gifts to charitable uses. Where a gift is made with a view to found a hospital or college, not in being, and which requires a future act of incorporation, the gift is nevertheless valid, and the law will sustain it and carry it into effect: *Case of Sutton Hospital*, 10 Co. 32; *Attorney-general v. Bowyer*, 3 Ves. 714. In order to determine, whether an act of incorporation was inconsistent with the purposes of the testator, it is necessary to examine the provisions of the will more particularly. That object was avowed to be, to promote learning, morality, and piety, by a school for youth desirous of improvement, by assisting to compensate and pay a qualified instructor, especially where there are virtuous and pious youth of genius, in indigent circumstances, who would esteem it a favor to be furnished charitably with tuition. The object is, in its nature, lasting and perpetual, and would be greatly aided by an act of incorporation. The property also is given in trust to certain persons and their successors, whom they shall name, without any limitation of number or prescribed mode of appointment, thereby leaving it to them to adopt any convenient mode, which would insure a perpetual succession. There is a further provision, that such trustees and their successors may make, from time to time, such rules and regulations as they may believe best adapted to insure success.

With these large powers, and with this object in view, if the trustees named considered that an act of incorporation of themselves, and such persons of their nomination as they thought suitable, the best mode of securing a regular succession of trustees, a secure and faithful investment and administration of the funds, and a perpetual accomplishment of the design of the donor, they were authorized to ask for and accept such an act of incorporation, provided the provisions of such act were calculated to promote and carry into effect, and not in form or substance to defeat, the objects of the testator. The act in question seems to be of this character. After incorporating the trustees in usual form, by the name of the Sanderson academy and school fund, it provides that all grants and donations, which have been or shall hereafter be made for the purpose aforesaid, shall be confirmed to said trustees and their successors in that trust forever, for the uses, which in such instruments are or shall be expressed. That authority to hold

other grants for the like purposes, to a limited amount, and that the acceptance of such grants, are not inconsistent with the intentions of the testator, is manifest from this; that after enjoining a regard to virtuous and pious youth of genius, in indigent circumstances, he concludes by hoping and praying, that the Lord will raise up benefactors to this institution, and that the result may be the reclaiming the vicious, the instruction of the ignorant, and the promotion of true virtue and piety.

Supposing the trustees to have acted within the scope of their authority, in procuring an act of incorporation, so that they were constituted an eleemosynary corporation for the administration of the charity of the founder, still the questions recur: 1. Whether the plaintiffs can rightfully claim to act as visitors; 2. Whether their remedy is by bill in equity; and, 3. Whether they show such a breach of trust on the part of the trustees, as will enable them to sustain the bill.

The rule as laid down above, and recognized in all the cases, is, that the law appoints the founder and his heirs to be visitors, where he has not confided the visitorial power to other hands; but where he has done so, no such resulting power to the founder and his heirs, is raised by implication. In most cases of eleemosynary corporations the founders do not retain this visitorial power in themselves, but assign or vest it in favor of some certain specified trustees or governors of the institution: 2 Kent Com. 301.

It is not necessary that the visitorial power should be given in terms; where that general control, superintendence, and management of the institution is given, which essentially constitutes the visitorial power, and especially where those thus intrusted with the management and control are not themselves the ultimate beneficiaries, there the power of visitors is in the overseers or trustees, and does not vest by implication, in the donor or his heirs. And this is the nature and character of most if not of all the colleges, academies, and free schools which have been established in New England, and well enough accounts for the fact, that no question of this kind has ever before arisen.

In applying these rules to this will, it is manifest, that the trustees and their associates were not the persons ultimately intended to enjoy the benefit of the charitable donation of the founder. Whether this ultimate benefit is considered to inure to the use of the instructor of the institution, whose compen-

sation is to be enlarged by the income from this fund, or the youth who are to receive gratuitous tuition in whole or in part, in either case the trustees receive nothing but the satisfaction of administering the donor's bounty.

And further, the power of general superintendence and management, that is, the visitorial power, is confided to these trustees in the fullest manner. He authorizes them to invest the funds, as they shall think best, the interest to be applied to the pay or maintenance of a faithful, competent instructor of said school in Ashfield, and he requests them to give to said institution an appropriate name. The appointment and removal of the master was not given in terms, but it was by necessary implication, because they would pay such instructor only as they should judge faithful and competent. But another clause is still more express and explicit; "relying on the integrity and faithfulness of said trustees and their successors, to make from time to time such rules and regulations as they may believe best adapted to insure success." On both grounds, therefore, one, that the trustees themselves were not the ultimate objects of the donor's charity, and the other, that large and ample power of control and management was confided to the trustees, we are of opinion that no visitorial power resulted to the heirs of the donor, and that they can not maintain this suit.

From this view of the subject, however, it is not to be concluded that trustees having themselves a visitorial power are beyond the reach and animadversion of the law. So far as the trustees are, from the terms of the will under which they hold, or from the nature of the objects to be obtained, vested with a power to act, that power is, in its nature, discretionary, and *quasi* judicial, and in the exercise of it, so far as they act with good faith, no other tribunal will or can control them. But in case of any violation of law, they may be proceeded against by any suitable and appropriate process, either at law or equity, as by writ of mandamus, or prohibition, by information, or by an action on the case, where that remedy is appropriate. And where there are trustees, in virtue of an express trust under a will, and where, therefore, they are within the equity jurisdiction of this court, they are, it seems, within the superintending power of a court of equity, not as if itself possessing a visitorial power, or a right to control the charity, but as possessing a general jurisdiction of all abuse of trusts, to redress grievances and prevent and suppress frauds. In such case the

interests of the public, or, what is the same thing, of the general and indefinite objects of the charity, would be represented by the attorney-general.

Chancellor Kent, in his excellent treatise, says, it is also well understood that the court of chancery has a jurisdiction over charitable corporations for breaches of trust: 2 Kent Com. 304.

This opinion renders it unnecessary to consider, whether this bill could have been sustained in its present form, inasmuch as it does not allude to the fact of the incorporation of the trustees, or charge them in their corporate capacity; and upon that point we give no opinion. Perhaps this error, if it might have been considered one, was an error of form only, and open to amendment.

On the whole, the court are of opinion, that the plaintiffs have no right, either as *cestuis que trust*, or as visitors, to require the discoveries and accounts sought for in the bill, and that the bill be dismissed, with costs.

STATUTE OF 43 ELIZ. IS IN FORCE IN WHAT STATES: See *Going v. Emery*, 26 Am. Dec. 645, and other cases in this series referred to in the note thereto. That this statute is in force in Massachusetts is a principle to which *Going v. Emery* and *Sanderson v. White* are both cited in *Washburn v. Sewall*, 9 Metc. 282. In *Drury v. Inhabitants of Natick*, 10 Allen, 182, the dictum of Chief Justice Shaw in the principal case, that since the statute of 43 Eliz. all gifts are to be deemed charitable which are enumerated in that statute, and none others, is referred to as having omitted, either by accident or because it was immaterial to the case, the qualification that gifts are also to be deemed charitable, which are, by analogy, within the spirit and intendment of the statute.

REQUESTS TO CHARITABLE USES, VALIDITY OF: See *Going v. Emery*, 26 Am. Dec. 645, in the note to which the cases in the American Decisions on this subject are collected. The foregoing case of *Sanderson v. White* is referred to as an authority on the following points connected with the subject of charitable bequests: Where the trustees of such a bequest are guilty of abuse or maladministration of it, the heirs of the donor can not reclaim the property as in case of a void devise: *White v. South Parish in Braintree*, 13 Metc. 514. So, where there is a failure to accomplish within a reasonable time the purpose of the bequest: *Fainter v. Clark*, 5 Allen, 60. For such abuse of the trust or failure to execute it the remedy is by a proper application by the proper party to the superintending power of the court of chancery to enforce the trust: *Fainter v. Clark*, *supra*; *McDonald v. Massachusetts General Hospital*, 120 Mass. 435. This branch of the jurisdiction of the English court of chancery belongs to the Massachusetts equity courts: *Harvard College v. Society*, 3 Gray, 282; *Jackson v. Phillips*, 14 Allen, 593. Gifts to charitable uses are highly favored in Massachusetts, and where such a gift can not take effect immediately for want of proper objects or trustees, or of enabling acts of the legislature or executive, it will not be defeated;

Fellows v. Miner, 119 Mass. 545; *Odell v. Odell*, 10 Allen, 8. A public or charitable trust may be perpetual in its duration and yet may leave the mode of its application and the selection of particular objects to the discretion of the trustees: *Jackson v. Phillips*, 14 Id. 550.

VISITOR OF ELEEMOSYNARY CORPORATION.—A power of general superintendence given by the founder to the trustees of an eleemosynary institution makes them visitors, though not so called in the will: *Drury v. Inhabitants of Natick*, 10 Allen, 175, citing the principal case.

GOODNOW v. SMITH.

[18 PICKERING, 414.]

COVENANT NEVER TO SUE ONE OF TWO JOINT AND SEVERAL promisors in a note does not, like a release to one, discharge the other obligor.

SUCH A COVENANT IS A GOOD DEFENSE TO THE COVENANTEE in an action against both promisors on the note, but the plaintiff, under stat. 1834, c. 189, is entitled to judgment against the other promisor.

PAYMENT OF HALF THE NOTE BEFORE DUE, and taking at par the note of a third person indorsed by the plaintiff without recourse, for a small sum, constitute a sufficient consideration for such a covenant.

ASSUMPSIT on a joint and several promissory note for five hundred and fifty-one dollars, executed by the defendants Smith and Adams. Plea, by the defendant, Smith, the general issue, the defendant Adams being defaulted. Smith's defense was, that before the note was due the plaintiff agreed with him, if he would pay half the note and take at par a certain note for a small sum of one Willis, indorsed by the plaintiff, without recourse, he would exonerate and discharge him from payment of the other half; and that he, the said Smith, then paid said half and took Willis' note as agreed. The jury were instructed: 1. That the consideration for said agreement was sufficient. 2. That the agreement was a covenant not to sue Smith, and as the plaintiff had recourse against the other debtor alone, the agreement must be taken as equivalent to a release to avoid circuitry of action. 3. That the agreement was admissible in evidence under the general issue.

Farley and Mellen, for the plaintiff.

Hoar and Mann, for the defendant.

By Court, WILDE, J. This case turns on the distinction between a technical release, and a covenant not to sue one of two joint obligors or promisors. The distinction is, that a release to one of two joint and several obligors discharges both, whereas, a covenant with one not to sue him, is not to be con-

strued as a release, so as to discharge the other obligor. This distinction is well founded on principle, and is supported by all the authorities. In the case of *Lacy v. Kynaston*, 2 Salk. 575, which was an action on a joint and several obligation, it was decided, that a covenant not to sue one of the obligors, would not operate as a defeasance or release, because to construe it so, would discharge the other obligor; but if the covenantee had been the sole obligor, then the covenant, although not a release in its nature, should be so construed, to avoid circuitry of action. The same principles were laid down in the case of *Dean v. Newhall*, 8 T. R. 168. That also was an action on a joint and several bond, and the defendant pleaded a release to Taylor, the other obligor, upon which issue was joined. At the trial, it appeared, that the plaintiff had covenanted not to sue Taylor, and in the deed of covenant he had agreed, that in case he should sue, etc., that deed "should be a sufficient release and discharge to all intents and purposes, both at law and in equity, to and for the said C. Taylor, etc., and as such should and might be pleaded in bar by him the said C. Taylor." Notwithstanding this agreement, it was held, that the covenant could not be pleaded in bar as a release and discharge, on the distinction laid down in the case of *Lacy v. Kynaston*, and in other cases there cited. And these decisions are approved and confirmed in *Hutton v. Eyre*, 6 Taunt. 289; in *Rowley v. Stoddard*, 7 Johns. 207; in *Shed v. Peirce*, 17 Mass. 623; and in *Harrison v. Close*, 2 Johns. 448 [3 Am. Dec. 444]. It is, therefore, a well-established principle, that although an actual release to one of two joint and several obligors or promisors is a discharge of the debt, and consequently may be pleaded in bar by both of the obligors or promisors, yet that a covenant or agreement with one of several joint obligors, not to sue him, can not be so pleaded. For if such a covenant or promise not to sue were allowed to operate as a discharge of one of several joint promisors or obligors, the creditor could have no remedy against the other obligor or promisor, although he had expressly or impliedly reserved the right to proceed against him.

This consequence would not follow if the obligation or promise were joint and several; for in such a case the creditor might sue the party with whom no agreement had been made, and there would be no necessity for his resorting to a joint action. But if on this distinction the matter relied on by the defendant, Smith, would amount to a defense to the whole action at common law, the plaintiff being entitled to a separate action

against Adams, yet since the stat. 1834, c. 189, no such defense can be maintained. For by that statute the plaintiff is entitled to have judgment against Adams, and Smith may defend himself, we think, in this action, in the same manner as he could if the action had been brought against him alone.

It is objected, that there was no consideration for the agreement with Smith, but certainly the payment of half the note before it was due, and taking the note of Willis at par, was a sufficient consideration.

We are of opinion, therefore, that the plaintiff is entitled to judgment against Adams, and that Smith is entitled to judgment for his costs.

COVENANT NOT TO SUE ONE OF TWO OBLIGORS OR PROMISORS does not release the demand or protect the other from suit: *Harrison v. Close*, 3 Am. Dec. 444. A covenant not to sue generally may be pleaded as a release, but a covenant not to sue for a limited period can not be so pleaded in a creditor's action: *Clopper v. Union Bank*, 16 Id. 294.

RELEASE OF ONE JOINT DEBTOR is a release of all: *Allin v. Shadburne's Ex'r*, 25 Am. Dec. 121; *Prince v. Lynch*, 38 Cal. 532, 537, citing the principal case. So a release of one of several joint trespassers releases all, even though the releasor stipulates that it shall not discharge the others: *Ellis v. Bitzer*, 15 Am. Dec. 534. In *Leonard v. Robbins*, 13 Allen, 219, the foregoing decision of *Goodnow v. Smith* is cited to the point that in an action against two or more defendants jointly, the plaintiff may, under the statute of 1834, c. 189, take judgment against one only, if only one is found to be liable.

SIMPSON v. McFARLAND.

[18 PICKERING, 427.]

PLAINTIFF IN REPLEVIN MUST SHOW AN UNLAWFUL TAKING or detention to support the issue on his part under a plea of *non cepit*.

DEFENDANT CAN NOT HAVE JUDGMENT FOR A RETURN of the property where he prevails under a plea of *non cepit* in replevin, but he may have a return awarded where he pleads property in himself or another.

NON CEPIT AND PROPERTY IN ANOTHER MAY BE PLEADED TOGETHER in replevin.

IN REPLEVIN BY A MORTGAGEE AGAINST THE MORTGAGOR of chattels, where the mortgage was not recorded in the proper county, and the goods have been attached by a creditor of the mortgagor, the defendant, upon a judgment of nonsuit, because no wrongful taking or detention was shown, can not have a return of the property awarded, he not being entitled to the possession against the mortgagee, nor liable to the attaching officer.

REPLEVIN. Pleas, *non cepit* and three special pleas, the substance of which is stated in the opinion, upon which the

plaintiff joined issue. It appeared at the trial, that the defendant, who resided in Cambridge, mortgaged the property in question, consisting of certain household goods, to the plaintiff, on November 13, 1832, to secure a certain debt, and that the mortgage was recorded in the town clerk's office in Boston, December 3, 1832, and in the town clerk's office in Cambridge, July 29, 1833, but that on July 26, 1833, the property was attached by one Edwards, a deputy sheriff, at the suit of a creditor of the defendant, who afterwards, to wit, in March, 1834, obtained judgment in said suit. The writ in the present suit was issued March 15, 1834, and a day or two prior thereto the plaintiff, by his agent, had demanded the goods of the defendant, who pointed them out to him, and made no objection to his taking them. The agent was prevented from taking them by one Richardson, the owner of the house where they were, under whom the defendant had been tenant, but had surrendered his lease before the attachment. Richardson had receipted for the property to the attaching officer, and had appointed certain parties, to whom he gave an oral lease of the house, as keepers. Other facts appear from the opinion. A nonsuit was entered, subject to the opinion of the whole court upon the facts.

Farley and Bultrick, for the plaintiff.

Mellen, contra.

By Court, MORRIS, J. The case was substantially tried on the plea of *non cepit*. And we are clear in the opinion, that there was not evidence enough to support the action on this plea. The plaintiff, to maintain this issue on his part, must prove either an unlawful taking or an unlawful detention: *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; *Baker v. Fales*, 16 Id. 147; *Marston v. Baldwin*, 17 Id. 606.

It is not pretended that the defendant wrongfully took the goods from the plaintiff. The plaintiff had formerly sold and delivered them to the defendant, and never afterwards, and before the service of this writ, had or claimed possession. Nor is there any better ground for maintaining that the defendant wrongfully obtained them. He showed them to the plaintiff, and made no objection to his taking them. They had been attached at the suit of a creditor of the defendant; the legal possession was in Edwards, the officer; and the actual custody in his servant Richardson, the receiptor.

The letter which the plaintiff relies upon can not avail him.

If it contained a clear confession of the defendant, which it does not, it would not control the facts fully proved by the testimony of the plaintiff's own unquestioned witness. It is very manifest that here was neither a taking nor a detention; and the nonsuit must therefore stand.

But now arises the more difficult question, whether the defendant is entitled to a return. The plea of *non cepit* admits the property to be in the plaintiff; and, of course, on that plea the defendant can not have judgment for a return. "On the plea of *non cepit* he can not have a return:" *Holmes v. Wood*, 6 Mass. 1; 1 Williams' Saund. 347, note 1. In England, the defendant can never have a return, unless he plead property in himself or another, or make avowry or conusance: *Wildman v. North*, 2 Lev. 92; *Butcher v. Porter*, 1 Salk. 94; Bull. N. P. 54. But in this state we have relaxed the strictness of the English form of pleading in replevin, as well as in other cases. And avowries are less frequently resorted to now than formerly: *Quincy v. Hall*, 1 Pick. 361 [11 Am. Dec. 198.]

But the general principle is the same here and in England. Whenever upon the pleadings it appears that the defendant is entitled to a return, he will have judgment for it; otherwise he will not. Thus on a plea in abatement, when the defendant prevails, but no facts are stated in the plea or suggested on the record, showing that he has a right to the possession, he can not have a return: *Gould v. Barnard*, 3 Mass. 199. But if the plea in abatement shows that the plaintiff is not entitled to hold possession, the court, in rendering judgment, will award a return. Thus when the defendant, in his plea, alleges property in himself or a stranger, he is entitled to be restored to the possession, either because the property is in him or because he is accountable for it to the true owner; *Salkold v. Skelton*, Cro. Jac. 519; *Presgrave v. Saunders*, 2 Ld. Raym. 984. And although it may appear that at the time to which the pleas must refer, viz., that of the service of the replevin, the property was in the defendant, and he was then entitled to the possession, yet if it also appear that by subsequent events and before the rendition of judgment, his right has ceased, he can not have judgment for a return. Buller (N. P. 54), referring to *Danville*, 652, says: "Where by matter subsequent he is not to have the thing for which the distress was taken, there he will not be entitled to a return." And in *Wheeler v. Train*, 4 Pick. 168, where it appeared at the time of the trial that the plaintiff was not entitled to recover because the chattels were under

lease, and the lessee's interest had been attached by the defendant, but before judgment was rendered the plaintiff became entitled to the possession by the expiration of the lease, the court rendered judgment for the defendant, but refused to award a return. It would have been not only useless, but unjust, to have restored the chattels to the defendant, as the plaintiff might have recovered them back immediately, the attachable interest of the lessee having expired.

We have already shown, that on the plea of *non cepit* the defendant is not entitled to a return. If he can claim it at all, it must be upon some of his special pleas. This renders it necessary briefly to examine them.

In the first special plea, the defendant alleges that the goods were his property, that Edwards, a deputy sheriff, attached them at the suit of one of his creditors, who recovered a judgment which had not been satisfied, and that the goods were held by Edwards by virtue of the attachment.

The second special plea is the same as the first, except that instead of alleging that the goods were held by Edwards, it alleges that they "were in the custody and keeping of one Richardson, as the servant of said Edwards, and to whom said goods had been delivered by said Edwards to be kept, in and by virtue of said attachment."

The third special plea alleges, that the property was in Richardson, and not in the plaintiff.

To all these pleas, the plaintiff, denying that the property and possession are as stated, reaffirms that the property is in himself; upon which issue is joined.

The first question which has been raised and argued upon these pleadings is, whether they are not so inconsistent and repugnant as by the rules of double pleading to be inadmissible. There certainly seems to be some absurdity in trying, in the same case, pleas so contradictory and irreconcilable as some of these seem to be. For if the defendant never took the goods, what does it matter whose they are? He certainly can not claim to have the possession of them. But it is not easy to say how far in inconsistency double pleas may go, or what pleas which may be tried by the same forum, may be deemed so repugnant as not to be allowed to be pleaded together. In Com. Dig., Pleader, E 2, many instances of double pleading are cited where the pleas are quite as inconsistent as these. And it is there said, and also in Barnes, 364, that in replevin, *non cepit*, property in another, and *liberum tenementum* are al-

lowed. This seems to support this mode of pleading. But if the special pleas are admissible, and we are inclined to think they are, they will not change the aspect of the case.

Although the facts are not brought before us and spread on the record, by a special verdict, as in *Wheeler v. Train*, yet we have them in a form not less authentic. Facts reported by the judge who tried the cause, are not of less verity or less within our cognizance, for many purposes, than if they were brought before us by a special plea or verdict. From the report in this case, it is perfectly clear that the plaintiff can not support his action, and not less clear that the defendant has no right to the possession of the goods.

As against the defendant the plaintiff manifestly had a right to the possession. His mortgage, though by reason of its not having been recorded in the town where the mortgagor resided, it would not avail him against a *bona fide* sale by the mortgagor or an attachment by a creditor of the mortgagor, yet, as between the parties, was valid: Stat. 1832, c. 157. See also Rev. Stat., c. 74, sec. 5. The condition was broken; the plaintiff had a right to take possession under it, and of this the defendant could not complain. There is no ground upon which the court could restore, or, more correctly speaking, transfer the goods to the defendant. He is not entitled to possession as general owner, against the mortgagee; he has no special property in them; and he stands in no such relation to the officer or creditor, as to render him accountable to either of them.

Furthermore, should we award a return, it would not exempt the plaintiff from his liability to Edwards. The writ of replevin would not justify the plaintiff in taking the goods from Edwards, who had the legal possession and the actual custody, by his servant. This was a trespass, for which he will be liable, whether we order a return or not.

But if we disregard the facts reported, and look only to the pleadings, the defendant's claim of a return can not be supported. The plea of property in the receiptor most obviously must fail, for he had neither property nor possession: *Commonwealth v. Morse*, 14 Mass. 217. The two other special pleas, after setting forth by way of inducement, a general property in the defendant, allege a special property in Edwards. The evidence would undoubtedly support these issues on the part of the defendant; for the mortgage was of no avail against this attachment. At the time to which the pleas refer, the time the goods were replevied, the officer had a lien upon them which en-

titled him to hold possession. But the pleas also show facts from which it appears, that, at the trial, the attachment was dissolved by lapse of time. So that though the officer might seize the goods on an execution, if he had one, and could find them, yet he could not hold them by virtue of his original attachment. Therefore, by the authority of *Wheeler v. Train*, upon the facts shown in the pleas, there is no ground for a return.

We feel the greater satisfaction in following out the legal principles to this result, because it makes the nearest practical approximation to exact justice between the parties. While the plaintiff should have the greatest benefit which he can derive from his mortgage, without infringing the rights of innocent parties, the consequences of his own negligence should fall on himself, rather than on the more careful and vigilant creditors, who attached the goods before his mortgage was legally recorded. And while he will hold the property, he will be liable to a suit by the attaching officer, in which the measure of damages will be the amount of the creditor's claim, leaving the balance to pay the plaintiff's demand as far as it will go: *Boyd v. Moore*, 11 Pick. 362.

Judgment for defendant for costs, but no return.

REPLEVIN LIES FOR UNLAWFUL TAKING OR DETENTION OF CHATTELS: See *Crocker v. Mann*, 26 Am. Dec. 684, and other cases in this series cited in the note thereto.

PROPERTY IN A STRANGER MAY BE PLEADED IN REPLEVIN: *Marsh v. Pier*, 26 Am. Dec. 131; and under such a plea the defendant may prove that a sale by such stranger, under which the plaintiff claims, was fraudulent: *Quincy v. Hall*, 11 Id. 198.

AWARDING A RETURN IN REPLEVIN.—A return will not be awarded upon judgment in favor of the defendant in an action of replevin, where, from a view of all the facts of the case, it appears that at the time the writ was sued out, or by reason of events subsequently occurring before the rendition of judgment, the defendant is not entitled to the possession of the goods: *Bartlett v. Kidder*, 14 Gray, 452; *Davis v. Harding*, 3 Allen, 303; *Ware River R. Co. v. Vibbard*, 114 Mass. 463, all citing *Simpson v. McFarland*. But, in opposing a return, the plaintiff must bring himself within some of the exceptions to the general rule requiring a return where the verdict is for the defendant on an issue of property and right of possession: *Barry v. O'Brien*, 103 Id. 522.

COMMONWEALTH v. RICHARDS.

[18 PICKERING, 434.]

EVIDENCE OF WHAT A DECEASED WITNESS TESTIFIED ON A FORMER TRIAL of the same cause is admissible in a criminal case against the defendant, and this is no infringement of the constitutional requirement that the accused shall be confronted with the witnesses against him.

DECEASED WITNESS' WHOLE TESTIMONY IN HIS OWN WORDS must be proved, in such a case, and not merely the substance of what he swore to, as shown by other witnesses, though testifying from notes taken at the time.

INDICTMENT for perjury, tried at the common pleas. One Hopkins, a witness against the accused at the preliminary examination, having since deceased, the prosecution introduced Adams and Keith as witnesses to prove what Hopkins' testimony was at the examination. They testified by the aid of notes taken at the time, but could not give the witness' exact words, but only the substance of his testimony, though one of them said he was confident as to the verbs and substantives, but not as to the prepositions and conjunctions used by Hopkins. The evidence was admitted against the defendant's objections. Verdict of guilty. The defendant excepted to the ruling admitting the said evidence.

W. Brigham, for the defendant.

Austin, attorney-general, for the commonwealth.

By Court, PUTNAM, J. The question is, whether the testimony of Messrs. Adams and Keith, of what S. Hopkins swore to before the magistrate upon the examination of the defendant, on the charge of perjury, is competent evidence.

It has been contended for the defendant, that the admission of such evidence is directly against the twelfth article of the bill of rights, which provides, that in criminal cases the subject shall have a right "to meet the witness against him, face to face."

Now the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. Was it competent for the witnesses, who testified at the trial in the court of common pleas, in the presence of the prisoner, to state what Hopkins, who is now deceased, did swear to before the magistrate in the presence of the prisoner? We do not think that the case falls within the constitutional objection. That provision was made to exclude any evidence by deposition, which could be given

orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law. In trials for murder, for example, the dying declarations of the party as to the fact of having received the death-wound from the party accused, and the circumstances attending, have been proved by persons who were present and heard and could make oath to such declarations. They are not considered as hearsay evidence, for being made under the apprehension of immediate death, they are justly supposed to be entitled to all the credit which would be given to them, if the declarant made them upon oath. Such declarations, made when the accused was not present, are admissible in evidence: *Peak. Ev.* 60; *Rex v. Radbourne*, *Leach*, 512; and were not intended to be excluded or touched by the provision cited from the bill of rights.

We think it to be very clear, that testimony of what a deceased witness did testify on a former trial between the same parties on the same issue, is competent evidence. The rule is thus well stated in 2 Lilly Abr. 745: "If one who gave evidence on a former trial, be dead, then, upon proof of his death, any person who heard him give evidence and observed it, shall be admitted to give the same evidence as the deceased witness gave, provided it were between the same parties." I cite the passage for the expression "shall be permitted to give the same evidence," which the deceased gave. It is to be the same, not a part, not the effect or substance, but the whole evidence which the deceased witness gave, touching the matter or issue in controversy: 1 Ph. Ev., c. 7, sec. 7; *Miles v. O'Hara*, 4 Binn. 111; *Pyke v. Grouch*, 1 Ld. Raym. 730; *Melvin v. Whiting*, 7 Pick. 79; Bull. N. P. 242 *et seq.* In *Finn v. Commonwealth*, 5 Rand. 708, the court confined this rule of evidence to civil causes: "We can not find the rule has ever been allowed in a criminal case." But the rules of evidence in civil and in criminal cases are generally the same. And this rule was recognized in the information against *Buckworth*, T. Raym. 170, for perjury in a case of ejectment. The defendants pleaded not guilty; and to prove the perjury, a witness was produced to prove what one, who had since died, swore upon the first trial. Keyling, C. J., would not allow it, because the former trial was betwixt other parties. Twisden and Morton, *contra*, and it was allowed. Now Keyling did not contend, that such evidence was not competent, if it were between the same parties: *Vide*

S. C., 1 Sid. 377, where the particular evidence given by the defendant is set forth.

It is stated in Gilb. Ev. 889, that exceptions to the rules as to hearsay evidence applicable to ancient customs, do not apply to criminal cases. But in the case of the *United States v. Wood*, 3 Wash. C. C. 440, for robbing the mail, such evidence is held to be admissible. Bache was allowed to testify what Hare swore to at a former trial; but he could not do it. He could swear to what he thought was the substance and effect of it. He was allowed to refresh his recollection by reference to the minutes which he had taken at the time; but he was rejected, because he could not say that he recollected the words of Hare, although he felt the most entire confidence that he had taken them as the witness uttered them. Now this was right; for unless he could give the words, how can it be said to be the same evidence that the deceased witness gave? It is the mere inference; but the jury should draw the inference from the words which the deceased witness used. So in *Rex v. Jolliffe*, 4 T. R. 290, a witness was called to prove what Lord Palmerston had sworn to at a former trial, and was rejected, because he would not undertake to give the very words, but merely their effect, or substance.

But the whole of what the deceased witness said should be proved. Some part which was said and not recollected, might certainly limit and qualify the meaning of the words which are recollected. Hence it is, that persons who are in hearing, who are favorably inclined to one party, may recollect a particular expression, which conformed to their wishes, and wholly omit the words of qualification; while others, who incline towards the other side, will remember the words of qualification and forget or take no notice of the particular expression. We see this exemplified very frequently in trials before juries. How common it is, for the counsel engaged in the cause to disagree as to what the witness has sworn to recently. One notes down upon paper or treasures up in his mind, what he considers to be favorable, and disregards the rest, while the other recollects the rest with great clearness. And it is not unusual that the court understood the witness to state the matter differently from what the counsel on either side suppose was the evidence. The difficulty is increased by the length of time which has elapsed between the time when the testimony of the deceased witness was given, and the statement of it by the living witness who heard it.

To be worth anything the whole of what the deceased wit-

ness said upon the matter should be stated; and if you get the whole, it is very defective; for you can not have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony. The false witness can not endure the stings of his wounded conscience; his countenance, and his deportment will, in spite of his endeavors to the contrary, by signs as clear and intelligible as they are inexpressible, declare, that the story which he has just sworn to, is a lie.

These considerations induce us to require full proof of all that the deceased witness swore to. His words, and not the synonymous words of him who states his testimony, are to be recited. In *Wilbur v. Selden*, 6 Cow. 162, the court held, that the words of the deceased witness should be given, and not the substance of them. It is true, that this strictness will generally exclude such testimony; for if the evidence of a deceased witness was minute and protracted and related to a transaction which was of a complicated character, it would seem to be almost incredible that any person could with certainty recite it. If he undertook to do it, it is very likely he would lose as much in credit, as he should assume in positiveness. If the evidence related to a single fact, for example, whether the witness did or did not see A. B. sign such a note, the answer might well be recollected.

To apply this reasoning and the authorities which are cited at the bar, to the case under consideration, we think it to be very clear, that there was not legal and sufficient evidence given by Mr. Adams or by Mr. Keith, of what Hopkins, the deceased witness, swore to. They say they can not give the exact words, but their substance from recollection aided by notes of his testimony taken at the trial. And this sort of evidence was rejected by the circuit court of the United States in the case of the *United States v. Wood*, before cited. The case at bar is not certainly more favorable for the government than that was.

The result follows, that the verdict must be set aside, and a new trial be had at the bar of the court of common pleas for this county.

EVIDENCE AS TO WHAT DECEASED OR ABSENT WITNESS SWORE AT A FORMER TRIAL, admissibility of: See *Magill v. Kaufman*, 8 Am. Dec. 713 and note; *Drayton v. Wells*, 9 Id. 718; *Crary v. Sprague*, 27 Id. 110 and note; *State v. De Witt*, Id. 371. That evidence of what deceased witness testified on a former trial is admissible, is held, citing the principal case, in *Warren v. Nichols*,

6 Metc. 264, and *Yale v. Comstock*, 112 Mass. 268. So in criminal as well as civil cases: *United States v. Macomb*, 5 McLean, 289, commenting on *Commonwealth v. Richards* as "a case very much like" the one before the court. The rule on this subject in Massachusetts is held with great strictness as laid down in the principal case, that the whole of the deceased witness' testimony, regarding the matter in controversy, must be introduced, and not merely a part of it: *Woods v. Keyes*, 14 Allen, 238; and that the witness called to prove what the deceased witness swore must be able to state the language in which the testimony was given, "substantially and in all material particulars:" *Warren v. Nichols*, 6 Metc. 267; *Corey v. Jones*, 15 Gray, 545; *Yale v. Comstock*, 112 Mass. 269, all approving the principal case as authoritative on this point. But this doctrine is denied in *Iglehart v. Jernegan*, 16 Ill. 520, and *United States v. Macomb*, 5 McLean, 286, 294 *et seq.*; and it is held that it is sufficient in such a case to prove by the witness called, substantially what the deceased witness testified upon the particular subject of inquiry.

JONES v. RICE.

[18 PICKERING, 440.]

COMPOUNDING A MISDEMEANOR IS AN ILLEGAL CONSIDERATION FOR A NOTE, and avoids it.

ASSUMPT on a note. The defense was that the note was founded on an illegal consideration, and the court so ruled, when the plaintiff submitted to a nonsuit, subject to the opinion of the whole court. The opinion sufficiently states the facts.

Hoar, for the plaintiff.

S. H. Mann, for the defendant.

By Court, PUTNAM, J. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offense against the public. The sum of fifty-two dollars was given for the damages and expenses, and one hundred and thirty-two dollars for the compounding of the misdemeanor; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In *Drage v. Ibberson*, 2 Esp. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was

good in law. And the case of *Fallowes v. Taylor*, 7 T. B. 475, proceeds upon the same principle. It was there held by Lord Kenyon and the rest of the court, that a bond given to the plaintiff (who was clerk of the quarter sessions, and who was directed to prosecute the defendant for a public nuisance), conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies: 1 Russ. on Crimes, 210; *Edgcombe v. Rodd*, 5 East, 301.

The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offense, he might extort, for his own use, money which properly should be levied as a fine upon the criminal party for the use of the commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note to secure to his own use four times as much as in his own estimation his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial; for no part of it belonged to the party. He might settle for his own damage from the riot; but it would enable the party to barter away the public right for his own emolument, if we were to hold that the consideration of this note was lawful.

We are all of opinion that the nonsuit must stand.

ILLEGAL CONSIDERATION.—A contract whose consideration is an act forbidden by law or public policy is invalid and can not be enforced: See *Linn v. State Bank of Illinois*, 25 Am. Dec. 71, and other cases in the American Decisions collected in the note thereto. See also *Johnson v. Cooper*, 24 Id. 502; *Groton v. Waldoborough*, 28 Id. 530; *Spurgeon v. McElwain*, 27 Id. 286; *Myers v. Hodges*, Id. 319, and the cases cited in the notes to those decisions. In *Partridge v. Hood*, 120 Mass. 403, it is held, approving and following *Jones v. Rice*, that no action will lie upon an agreement for compounding a misdemeanor unless it appears that satisfaction has been acknowledged in, and approved by, the court in which the prosecution was pending, according to the Gen. Stat., c. 170, sec. 33, and c. 171, sec. 28.

BORDEN v. HINGHAM MUTUAL FIRE INS. CO.

[18 PICKERING, 523.]

OVERVALUATION OF PROPERTY INSURED by a mutual insurance company in the representation made by the insured, whereby an insurance is effected to an amount exceeding that to which the company is authorized to insure, is binding if there be no fraud or concealment, and the insurers knew, or had full means of knowing, the real value of the property, and in case of a loss the company is liable for the full amount of the policy.

ASSUMPSIT on a policy of insurance on a certain dwelling-house, barn, and shed, for the sum of one thousand five hundred dollars, which the policy stated was not more than three fourths of the value of the property, the company being authorized by its charter to insure such property to an amount not exceeding three fourths of its value. The charter also provided that losses on policies were to be paid by assessments on the members in proportion to their premiums and deposits, but not beyond double the amount of such premiums and deposits. The property at the time the insurance was effected was under mortgage to the parish of North Bridgewater, and the agent for the company through whom the insurance was made was the treasurer of the parish, and had possession of the mortgage. The plaintiffs had purchased the interest of the mortgagor and taken a quitclaim deed from him. The plaintiffs stated in their representation to the company that the buildings were under mortgage. The value which they put upon the property, the amount of the loss, and the amount of the mortgage, are stated in the opinion. The mortgagees had entered for foreclosure before the loss occurred. The mortgage was unpaid at the date of the loss. Other facts appear from the opinion. It was left to the court to say what, if anything, the plaintiffs should recover.

Beal, for the plaintiffs.

Eddy and Lincoln, for the defendants.

By Court, **PUTNAM, J.** The defense is made on the ground, that the plaintiffs had not an insurable interest to the amount of one thousand five hundred dollars insured by the policy. The dwelling-house was valued at one thousand seven hundred dollars; the barn and shed at three hundred and fifty dollars; and the land on which they stood was worth one thousand dollars; amounting in all, to three thousand and fifty dollars. There was a mortgage for one thousand six hundred and fifty dol-

lars. The value destroyed by the fire was one thousand eight hundred and fifty dollars. The plaintiffs represented to the defendants, that the estate was mortgaged, as is above stated. And the plaintiffs purchased the right to redeem, by a deed of quitclaim from the mortgagor. They took the estate subject to the mortgage; and the mortgagees have entered for condition broken. If the plaintiffs do not redeem, they will lose the land; for they have no recourse against the mortgagor. He has made no covenant to pay the mortgage; but he has merely quitclaimed to the plaintiffs his right and title to the estate. Now, if the amount of the plaintiffs' interest should be limited by deducting the amount due on the mortgage from the estimated value of the estate, it would be reduced to about one thousand three hundred dollars; and the value of their insurable interest, being not more than three fourths of the value of the property, according to that hypothesis, would have been less than one thousand dollars. Yet with full knowledge of the mortgage, and with full knowledge, or the means of knowledge, of the actual value of the buildings, the defendants undertake to insure to the amount of one thousand five hundred dollars, being less than three fourths of the value of the buildings, as estimated in the policy.

This is, indeed, a contract of indemnity; but we are to construe it according to the true intent and meaning of the parties; and we are not at liberty to make a new contract for them. The representation of the plaintiffs was made when the contract was made. It became then of vital consequence to settle the value, because the premium, the deposit, and the liability of the plaintiffs to assessments, were then to be fixed for seven years to come. We do not know what strangers would have considered the buildings to be then worth. They might have been worth more or less than the plaintiffs estimated them to be worth. But we do know that the plaintiffs estimated their interest in them to be worth two thousand and fifty dollars, notwithstanding the mortgage; and the defendants agreed to it. If it were not so, the plaintiffs would not get the security by the policy for which they paid, against the risk of fire; and the defendants would get an amount of premium and deposit, and a right or claim for contribution against the plaintiffs, who became members of the company, greatly beyond what they were entitled to have.

If a great calamity by the destruction of property insured against fire had happened, and assessments had been made

upon the members, we think the plaintiffs could not have been allowed to claim a deduction from their contribution, premium, and deposit, on the ground of an overvaluation. The answer would have been ready and effectual. The defendants would have said, "We took your own estimate of the value;" and the plaintiffs would have been concluded by it. And now, when the defendants come for an allowance, and claim to make the same objection, we think the plaintiffs may well answer, "You have accepted our estimate, and are bound by it as well as we are." We think that the parties did not intend, that the value of the buildings insured should thereafterwards be drawn into question. The plaintiffs made, and the defendants accepted the estimate; and the contract was made upon that basis. No fraud, concealment, or gaming, is suggested.

We are all of opinion, that the plaintiffs are entitled to recover the whole amount insured, it being less than the amount destroyed by the fire.

Defendants defaulted.

OVERVALUATION OF INSURED PROPERTY.—It is obvious that an excessive overvaluation of property upon which insurance is asked by the applicant for the insurance, may operate as a fraud upon the insurer and induce him to undertake a risk which he would not otherwise assume; and that under some circumstances such an overvaluation ought to be held to avoid the contract. But on the other hand, it is equally obvious that if every applicant for insurance were held to the strictest accuracy in the valuation placed upon his property, and if the policy were to be declared void for every over-estimation of value which the owner of property might be led to put upon it, by his pride of proprietorship, the contract of insurance would furnish a very uncertain security against loss. It is therefore clear that upon the plainest principles of justice, the rule of law upon the subject of avoiding policies of insurance because of overvaluation of the insured property should be such as, on the one hand, to punish, and thereby prevent fraud, and, on the other, to protect men from the consequences of their honest mistakes about a matter which is so largely one of judgment.

FRAUDULENT OVERVALUATION AVOIDS POLICY.—Fraud is a taint which vitiates every contract into which it enters. Insurance contracts are no exception to this rule. Unless, therefore, there is entire good faith as to every material part of such a contract, it may be avoided by the party who is injured by the want of good faith. The value of the insured property is not only a material, but an important consideration in every contract of insurance, because the more valuable it is, the more likely is the owner to be vigilant in protecting it from injury, and the less hazardous is it to insure it against loss. It is, therefore, to the interest of the insurer that the value should be sufficiently large to make the owner anxious to secure the property against loss, notwithstanding the insurance. The greater the value, the less, in proportion, is the risk to the insurer. The smaller the value, the greater the risk, because the owner feels the less interest in its preservation: *May on Insurance*, sec. 373; *Bobbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70.

Fraudulent overvaluation, therefore, operates to the material injury of the insurer by inducing him to incur a greater risk than he supposes he is incurring, and is obviously and justly a sufficient ground to enable him to avoid the policy: *Haigh v. De La Cour*, 3 Camp. 319; *Dickson v. Equitable Fire Assurance Co.*, 18 U. C. Q. B. 246; *Newton v. Gore District Mut. Fire Ins. Co.*, 33 Id. 92; *Riach v. Niagara Dist. Mut. Ins. Co.*, 21 U. C. C. P. 464; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411; *Hersey v. Merrimack Co. Mut. Fire Ins. Co.*, 27 N. H. 149; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; S. C., 8 Chicago Leg. News, 150; 2 Ph. Ins., sec. 1182; 1 Para. on Ins. 261; Fland. on Fire Ins. 79; Wood on Fire Ins., sec. 220.

RULE APPLIES BOTH TO "VALUED" AND TO "OPEN" POLICIES.—It is said in some of the cases, and also by some of the text-writers, that the rule which renders a policy voidable by the insurer for a fraudulent overvaluation applies only to "valued" policies and to those in which the value is made a warranty, and that in "open" policies the value is immaterial, because the risk in that class of policies is measured, not by the value as represented by the insured, but by the actual value at the time of the loss: *Cox v. Aetna Insurance Co.*, 29 Ind. 586; *Aurora Fire Ins. Co. v. Johnson*, 46 Id. 315; Wood on Fire Ins., sec. 220.

It is true that the doctrine has a special applicability to valued policies; for, by the contract in such cases, the value, as stated in the policy, is made the measure of the insurer's liability, being in the nature of stipulated damages. Hence, if the valuation is fraudulently excessive, the insurer is made responsible for a fictitious loss by the contrivance of the insured. It would be a strange system of justice which would permit such frauds to be successfully practiced. It is not to be wondered at, therefore, that the rule rendering a policy voidable for a fraudulent overvaluation should be laid down with peculiar emphasis in cases of valued policies. So, too, as we shall presently show, where the valuation in the application is referred to in the policy and made a warranty, there are special grounds founded in the law of warranties why a material overvaluation, even though it should not be intentionally fraudulent, should constitute a breach of the warranty, and defeat a recovery on the policy. But take the case of an ordinary "open" policy, in which the valuation is not expressly stated as a measure of damages, or incorporated as a warranty by reference to the application, but in which the actual cash value at the time of a loss is made the standard by which to determine the extent of a recovery by the insured, and it is clear to us that even in such a case a fraudulent overvaluation in the representations made by the insured, at the time of applying for the insurance, if relied upon by the insurer, must vitiate the contract. As we have already stated, and the position seems to us incontrovertible, the greater the value of the insured property, the greater the vigilance of the owner in preventing a loss, and the smaller the risk of the insurer. Given a certain amount of insurance upon a house, is not the hazard of the insurer proportionately greater if the house is worth three thousand dollars than if it is worth six thousand dollars? And if the house is actually worth three thousand dollars, but is fraudulently represented to be worth six thousand dollars, does not such overvaluation operate as an inducement to the insurer to enter into the contract? Is not the value of the property, therefore, as represented by the applicant, material in every such case? The opinion, in the case of *Bobbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70, is in accordance with the principle which is here insisted upon. There, an overvaluation by an applicant for insurance upon a

stock of goods was held material so as to vitiate the policy, though the insurer was liable only for the actual cash value at the time of the loss. There, it is true, the representation in the application as to the value was construed a warranty, but the court declared that if it had not been so, such representation would have been material. Where the policy limits the recovery to two thirds of the cash value at the time of the loss, there is stronger ground for holding an overvaluation immaterial, as was done in *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328, although the valuation was construed a warranty. There, however, the difference between the actual and the estimated value seems not to have been excessive.

In *Brown v. Quincy Mut. Ins. Co.*, 105 Mass. 396; S. C., 7 Am. Rep. 538, also, the valuation in the application was held not to be material or binding, because the policy provided that the insurers should not be liable beyond three fourths of the actual cash value at the time of a loss. It seems to us, however, that there is at least plausible, if not solid, ground for holding that even where the recovery is thus limited, a fraudulent overvaluation might well operate as an inducement to the contract, and be therefore in fact material, and a ground for avoiding the policy. In *Ionides v. Pender*, L. R., 9 Q. B. 531, the question as to whether an overvaluation of insured goods on shipboard was material to the risk, so as to require the underwriter to be informed of it, was left to the jury as a matter of fact for their determination. It is a significant circumstance, going to show that those engaged in the insurance business generally regard the value of the property as a material fact to be known to the insurer, when the contract is entered into, whatever the form of the policy, that representations as to value are always required and given. The distinction between "valued" and "open" policies in Wisconsin seems to have been practically abolished by statute in 1874, c. 347, providing that the amount of insurance written in an open policy should be conclusive as to the value in case of a total loss without criminal fault on the part of the insured; and this statute is held to apply notwithstanding a stipulation to the contrary in the contract: *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; see also *Thompson v. St. Louis Ins. Co.*, Id. 459; *Bammessel v. Brewers' Fire Ins. Co.*, Id. 463; *Thompson v. Citizens' Ins. Co.*, 45 Id. 388.

WHERE OVERVALUATION NOT FRAUDULENT.—"Value," says Blodgett, J., in *Field v. Insurance Co.*, 6 Biss. 121, "is always, to a considerable extent, a matter of opinion and judgment, and it would not be right to hold a policy void for overvaluation, when it was clear from the proof that there was no intention to deceive, and when there was room for an honest difference of opinion." It would be a most harsh and unjust rule which would not make allowance for such difference of opinion, and for the natural tendency of men to put a higher value upon their own property than other persons would be likely to put upon it, in determining the effect of an overvaluation of insured property. The element of actual or presumptive fraud ought to appear in the overvaluation, except where there is a warranty as to the value, in order to justify avoiding the policy on that ground. The general rule is, therefore, that an honest overvaluation, arising from mere error of judgment, and not made intentionally, or with any fraudulent purpose, will not vitiate a contract of insurance: *Wood on Fire Ins.*, sec. 220; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451; *Citizens' Fire and Marine Ins. Co. v. Short*, 62 Ind. 316; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328; *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Harrington v. Fitchburg Mutual Fire Ins. Co.*, 124 Id. 126; *Akin v. Mississippi Marine and Fire Ins. Co.*, 4 Mart. (N. S.) 661; *Franklin Ins. Co. v. Vaughan*, 92 U. S.

516; *Park v. Phoenix Ins. Co.*, 19 U. C. Q. B. 110; *Laidlaw v. Liverpool etc. Ins. Co.*, 13 Grant Ch. 377.

So though, by reason of such overvaluation, the insurance, together with other insurance upon the same property, exceeds three fourths of its value, contrary to a stipulation in the policy: *Harrington v. Fitchburg Mutual Fire Ins. Co.*, 124 Mass. 126. Hence if the policy is a "valued" one, the value named therein, if there be no fraud, actual or presumptive, is binding, although it may very greatly exceed the real value: *Fland. on Fire Ins.* 77; *May on Ins.* 27; *Wood on Fire Ins.*, sec. 43; *Patapasco Ins. Co. v. Biscoe*, 28 Am. Dec. 219; *Akin v. Mississippi Marine and Fire Ins. Co.*, 4 Mart. (N. S.) 661; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Sturm v. Atlantic etc. Ins. Co.*, 6 Jones & S. (N. Y.) 281; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451; *Howland v. Insurance Co.*, 2 Cranch C. C. 471; *Griswold v. Union etc. Ins. Co.*, 3 Blatch. 231. The same principle applies with peculiar force to a policy issued by a mutual insurance company, where the value is either expressly stated in the policy, or being stated in the application, is made a part of the contract by a reference in the policy, because, as shown in the opinion in *Borden v. Hingham Ins. Co.*, *supra*, the insured is himself an insurer, and assumes a liability for losses incurred by the company proportioned to the valuation placed upon his property: *Fuller v. Boston Fire Ins. Co.*, 4 Metc. 206; *Phillips v. Merrimack Mutual Fire Ins. Co.*, 10 Cush. 350; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; S. C., 7 Am. Rep. 522; *Harrington v. Fitchburg Mutual Fire Ins. Co.*, 124 Mass. 126. The insured, also, is bound by the valuation, and can not show a different value: *Holmes v. Charlestown Mutual Fire Ins. Co.*, 10 Metc. 211. But a fraudulent overvaluation will vitiate such a policy if the company is disposed to avoid it: *Hersey v. Merrimack Co. Mutual Fire Ins. Co.*, 27 N. H. 149.

OVERVALUATION MAY BE PROOF OF FRAUD.—It is not necessary, in order to avoid a policy on the ground of overvaluation, that it should be proved to be actually fraudulent by evidence *aliunde*. The overvaluation itself may be so gross as to furnish presumptive evidence of fraud: 2 Ph. on Ins., sec. 2080; 1 Para. on Ins. 262; *May on Ins.*, sec. 373. But in order to have this effect the overvaluation must be so gross as to make it incredible that it should be honest: *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67; as where the jury, being interrogated on this point, answered that they could not see how the applicant could have thought the property worth the amount stated by him: *Newton v. Gore District Mutual Fire Ins. Co.*, 33 U. C. Q. B. 92. And it is proper to submit to the jury the question whether the overvaluation is excessive: *Ionides v. Pender*, L. R., 9 Q. B. 531. Instances of overvaluation held so excessive as to be sufficient evidence upon which to avoid the policy may be found in *Catron v. Tennessee Ins. Co.*, 6 Humph. 176; *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; S. C., 8 Chicago Leg. News, 150. A slight or inconsiderable overvaluation, such as may reasonably arise from an error of judgment, without any other evidence of fraud, will not of course afford ground for avoiding the policy: *Hodgson v. Marine Ins. Co.*, 5 Cranch, 100; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411; *Laidlaw v. Liverpool etc. Ins. Co.*, 13 Grant Ch. 377. And an overvaluation in the application is of no consequence without other proof of fraud, unless there is an express stipulation in the policy that it shall be avoided by overvaluation if the risk is less than the value, and if the value at the time of the loss exceeds the amount covered by the insurance: *Insurance Co. of North America v. McDowell*, 50 Ill. 120. An overvaluation upon property of variable value, such as a stock of goods which is expected to fluctuate in amount during the period covered by the

insurance, is in general not to be regarded as fraudulent without other proof: *Franklin Ins. Co. v. Vaughan*, 92 U. S. 516. So, even though the applicant knows that at the time of his application the valuation is in excess of the stock on hand, but makes such valuation in the *bona fide* belief that the stock will be kept up to the figures named: *Lee v. Howard Fire Ins. Co.*, 11 Cush. 324. But see *Bobbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70, for a case where overvaluation upon a fluctuating stock of goods was held to vitiate an open policy. Great discrepancy in the valuations contained in two applications for insurance upon the same property made within a few days of each other may, without other evidence of overvaluation, furnish sufficient evidence of fraud to vitiate a policy: *Dickson v. Equitable Fire Assurance Co.*, 18 U. C. Q. B. 246.

OVERVALUATION CONTRARY TO WARRANTY OR CONDITION IN POLICY.—

Where the application for insurance is referred to in the policy and made a part of it, and the representations therein contained are declared warranties, a clear overvaluation in such application will avoid the policy: *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Bobbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70. The objection, that the value is not material, because the risk depends upon the value at the time of loss, does not apply to such a case, if, indeed, it applies in any case, because a warranty is always material: *Bobbitt v. Liverpool etc. Ins. Co.*, *supra*. But see *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328, where an overvaluation in an application, even though constituted a warranty, was held immaterial, because by the terms of the contract a recovery on the policy was limited to two thirds of the actual value at the time of loss. If, however, a party has, by a misrepresentation as to the value of his property, and by warranting its value to be such as represented, obtained an insurance which he would not otherwise have obtained, ought he not to be held to the truth of his representation and warranty, even though he can only recover two thirds of the actual value at the time of loss? If the value is stated in the application, not positively but as "estimated" at a certain sum, it does not constitute a warranty, even though the application is made part of the policy; but it is so far material, that if it be knowingly made and considerable in amount, it will avoid the policy: *Riach v. Niagara District Mutual Ins. Co.*, 21 U. C. C. P. 464.

Scienter on the part of the assured as to the overvaluation is, of course, immaterial where such overvaluation is a breach of a warranty, or where it is expressly provided in the policy that it shall be void in case of an overvaluation. Where, therefore, there is such a condition in the policy, any substantial overvaluation will avoid it, whether such overvaluation be fraudulent or innocent: *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4; 8 C., 31 Am. Rep. 666. And it was held by Mr. Justice Story, in a case where there was no such condition, that a great, though unintentional, overvaluation of certain additions to the property avoided the policy, because the insurers had previously refused to insure the same property at the valuation contained in an application to another company before the additions were made, on the distinct ground that the value was too low, this being a notification to the assured that the insurers regarded the value as a material point: *Carpenter v. American Ins. Co.*, 1 Story, 57.

The opinion in the case of *Field v. Insurance Co.*, 6 Biss. 121, is adverse to the doctrine that an unintentional overvaluation will avoid the policy, although there is a condition expressed in it that it shall be void for an overvaluation. The language of the condition in that case was, that "if the insured shall cause the property to be insured for more than its value, the

policy shall be void." In construing this condition, Blodgett, J., said: "The fair and legal meaning of this language is, that if the insured shall intentionally obtain insurance on her property to an amount greater than its value, with a design thereby of obtaining, in case of loss, more than her property was fairly worth, she shall forfeit her policy. It is a clause to prevent fraudulent overvaluation, and intended to deprive men of the benefit of such intentional overvaluation. But the clause does not render void a policy for such slight overestimates of value as may be reasonably accounted for from difference of opinion as to value." So far as "slight overestimates of value" are concerned, it is certainly reasonable that they should not vitiate a policy containing such a condition. But the language of the learned judge implies that no overvaluation, whether slight or considerable, will have that effect unless it be intentionally and fraudulently made. This seems to us to make such a condition in a policy utterly nugatory, for if there were no such condition, an intentional and fraudulent overvaluation would have precisely the same effect. Such a construction, therefore, violates the rule, that a contract should be construed, if possible, so as to give effect to every stipulation contained in it. Besides, is it not just that, where an applicant for insurance undertakes to state the value of the property with the understanding that his valuation constitutes a warranty, or that if it is an overvaluation it will avoid the policy, he should be held to state such value at his peril, so far as any clear and substantial excess is concerned?

EXAMINATION OF PROPERTY BY AGENT.—It is true that in the case just referred to, the agent of the company was requested by the applicant to examine the property for himself before the policy was issued. In our judgment, however, this fact makes no difference in the rule to be laid down as applicable to such cases. It is familiar law, that if a party to a contract chooses to protect himself by a warranty, instead of relying upon his own judgment, he is at liberty to do so. If, on the other hand, the policy is silent as to the effect of an overvaluation, and the agent of the company himself knows the value of the property, or has an opportunity to examine it for himself, and there is no actual fraud or concealment on the part of the assured, the policy ought to stand, notwithstanding an overvaluation: *Insurance Co. of North America v. McDowell*, 50 Ill. 120. Much more, if the agent makes the overvaluation himself, and the applicant takes no fraudulent part in it: *Cumberland Valley Mutual Protection Co. v. Schell*, 29 Pa. St. 31. But it is otherwise where the assured knowingly consents to the insertion of an erroneous statement of value by the agent in making the application. The fact that the agent connived at the fraud will not protect him: *American Ins. Co. v. Gilbert*, 27 Mich. 429.

GODFREY v. HUMPHREY.

[18 PICKERING, 537.]

THE PASSAGE BY THE WORDS "ALL MY REAL AND PERSONAL ESTATE," in a will.

WRIT of entry. The demandants claimed as heirs at law of Z. M. Thayer, the tenant under a devise from Thayer to his wife of "all my real and personal estate of every description, she paying my just debts and legacies." The devisee having

since died, the tenant claimed as her heir. The only question considered by the court was whether a fee passed by the words above quoted. Other facts are, however, adverted to in the opinion. Verdict for the demandants, subject to the opinion of the whole court upon the facts.

Metcalf and Churchill, for the tenant.

S. D. Parker, for the demandants.

By Court, SHAW, C. J. The single question in this case is, whether the devise of the testator, Z. M. Thayer, to his wife, gave her an estate in fee simple, or an estate for life only in the premises in controversy.

It is scarcely necessary now to repeat the familiar rule of law, that in a will, the word "heirs," or other express words of inheritance, are not necessary to create an estate of inheritance in the devisee, but if by the terms of the devise, expounded with reference to all the other provisions in the will, it appears affirmatively that it was the intent of the testator to give an estate in fee simple, the devise will be so construed, as to pass such an estate: *Baker v. Bridge*, 12 Pick. 27. Though if such an intent can not be found in the will, either expressed or implied in its terms, or drawn by fair inference from other manifest intentions expressed in the will, then, in favor of the heir at law, it must be construed to pass only an estate for life: *Farrar v. Ayres*, 5 Pick. 404; *Kellett v. Kellett*, 3 Dow. 248.

The court are of opinion, that this devise to the wife passed an estate in fee, without words of limitation, by force of the word "estate."

It has long been held, that the devise of all a man's estate, where there are not words to control or restrain its operation, shall be construed not merely to mean his lands, but the quantity of interest which he has in them, so as to pass an estate of inheritance, if he has one: *Carter v. Horner*, 4 Mod. 89; S. C., 1 Eq. Cas. Abr. 177.

Sometimes the word "estate" is enumerated with others, all descriptive of personal or chattel interests, so as to exclude real estate. Sometimes it is used as a word of mere local description, as, my estate at such a place. But where it can be construed to intend all one's real estate, without restriction, it carries a fee: *Holdfast v. Marten*, 1 T. R. 411.

In the case cited by the counsel for the demandants, *Bowes v. Blackett*, Cowp. 235, the testator gave all his lands, etc., and all his estate and interest in them, to his wife for life. Of course,

under this express limitation, the use of the word "estate" could have no effect. But in the devise to his sisters, no such word was used. This was remarked by Lord Mansfield, in giving the opinion of the court, implying that had these words been used, without limitation or restriction, in the devise to the sisters, they would have carried a fee. In a very recent case, *Doe v. Baines*, 2 Crompt. M. & R. 23, the devise was "of all and singular, my lands, etc., to be truly possessed and enjoyed;" and it was held not to pass a fee, upon the known distinction between "all my lands" and "all my estate."

This opinion renders it unnecessary to consider the other grounds upon which it is contended that this devise passed a fee, as, that it contained a personal charge on the devisee for the payment of debts and legacies, on failure of personal property, and that the estate consisted in part of wild lands; grounds, which, if the question depended upon them, would be entitled to great consideration.

Verdict set aside, and demandants nonsuit.

WHAT WORDS IN A WILL CARRY A FEE.—Words of inheritance are not necessary in a will to carry a fee: *Lindsay v. McCormack*, 12 Am. Dec. 387; *Jenkins v. Clement*, 14 Id. 698. The word "estate" is sufficient for that purpose: *Jackson v. Merrill*, 5 Id. 213; *Jackson v. Delancy*, 7 Id. 403. So held, approving the doctrine of the principal case, especially where the words are "all my real estate," or the like, in *Abbott v. Essex Co.*, 2 Curt. 132; *Parker v. Parker*, 5 Meta. 138; *Kellogg v. Blair*, 6 Id. 325; *Putnam v. Emerson*, 7 Id. 333; *Bacon v. Woodward*, 12 Gray, 379; *Spooner v. Lovejoy*, 106 Mass. 532; *Grossman v. Field*, 119 Id. 172. For other expressions which will have the same effect, see *Everts v. Chittendon*, 2 Am. Dec. 97; *Mayo v. Carrington*, Id. 580; *Richardson v. Noyes*, 3 Id. 24; *Harper v. Bleam*, 27 Id. 367.

WORDS IN A WILL WHICH WILL PASS REALTY.—A discussion of the cases on this subject will be found in the note to *Tolar v. Tolar*, 14 Am. Dec. 576.

BANCROFT v. INHABITANTS OF LYNNFIELD.

[18 PICKERING, 566.]

TOWN IS BOUND TO REPAIR HIGHWAYS within its bounds at the expense of the inhabitants.

TOWN MAY INDEMNIFY A SURVEYOR or other officer against liability incurred in the *bona fide* though mistaken discharge of the duty of the town to repair highways.

TOWN HAVING APPOINTED A COMMITTEE TO DEFEND AN ACTION brought against a surveyor for digging a ditch to improve a highway, or for the purpose of having the bounds of the highway legally determined, is liable for the expenses and services of the committee in discharging that duty.

ASSUMPSIT for services and disbursements of the plaintiffs as a committee appointed by the town of Lynnfield, pursuant to a vote of the inhabitants of the town, to defend a certain action of trespass brought against the surveyor of highways of the town, for causing a drain to be dug along one of the highways. It was a contested point whether the drain was dug to improve the highway or to test the question whether the highway covered the ground through which the drain was opened. The plaintiffs performed the duty assigned them touching the defense of said action, and judgment having been rendered against the defendant therein, they paid the damages, costs, and expenses of the defense. At a subsequent town meeting it was voted that the plaintiffs' bills for these disbursements should be paid. The grounds of defense relied on by the defendants in the present action appear sufficiently from the opinion. A *pro forma* opinion having been expressed that the defendants were liable, they consented to a default subject to the opinion of the whole court.

Saltonstall and Choate, for the defendants.

Shillaber and Huntington, for the plaintiffs.

By Court, **WILDE, J.** The defendants admit that the services of the plaintiffs, and the expenses by them incurred, for which they demand payment, were performed and incurred at the request of the town, and that their bills therefor were allowed at a legal town meeting. They nevertheless deny their legal liability to pay, on two grounds: 1. Because, as it is said, the town was not authorized by law to raise money for the payment of these services and expenses, and that the vote to pay for them was void; and, 2. That the consideration was illegal. Neither of these grounds of defense can, as we think, be successfully maintained.

It is undoubtedly true, as was decided in *Stetson v. Kempton*, 13 Mass. 272 [7 Am. Dec. 145], that towns have not an unlimited authority in their corporate capacity, to raise money and to cause it to be assessed upon the polls and estates of the inhabitants. Such an authority would be dangerous, and it has been limited by the statute of 1785, to the cases of providing for the poor, for schools, for the support of public worship, and other necessary charges. It may be that towns are not authorized to make any contract for the payment of money, which they are not authorized to raise money to discharge by a tax on the inhabitants. This question, however, was left un-

decided in the case of *Stetson v. Kempton*; nor is it necessary to decide it now, as we are of opinion, that the town is authorized to raise money by a tax for the payment of these charges.

It is the duty of a town to repair all highways within its bounds, at the expense of the inhabitants, so that the same may be safe and convenient for travelers; and we think it has the power, as incident to this duty, to indemnify a surveyor or other agent against any charge or liability he may incur in the *bona fide* discharge of this duty, although it may turn out on investigation, that he mistook his legal rights and authority. The act by which the surveyor incurred a liability, was the digging a ditch, as a drain for the security of the highway; and if it was done for the purpose of raising a legal question as to the bounds of the highway, as the defendants offered to prove at the trial, the town had nevertheless a right to adopt the act, for they were interested in the subject, being bound to keep the highway in repair. They had, therefore, the right to determine whether they would defend the surveyor or not; and having determined that question, and appointed the plaintiffs a committee to carry on the defense, they can not now be allowed to deny their liability, after the committee have paid the charges incurred under the authority of the town. The town had a right to act on the subject-matter, which was within their jurisdiction, and their votes are binding and create a legal obligation; although they were under no previous obligation to indemnify the surveyor. That towns have an authority to defend and indemnify their agents, who may incur a liability, by an inadvertent error, or in the performance of their duties imposed on them by law, is fully maintained by the case of *Nelson v. Milford*, 7 Pick. 18.

That case also is decisive as to the other ground of defense, in relation to the consideration. In that case it was decided, that a promise to refund money paid by assessors on an illegal assessment of a town tax made by them, was a valid contract; and, in the present case, the plaintiffs' only claim is for services rendered and money paid for the town at their request. No illegal act is imputed to the plaintiffs; and, when they were appointed a committee, they had no knowledge that any error had been committed by the surveyor. They have acted in good faith, and are clearly entitled to be compensated and reimbursed for their services and expenses.

Motion to take off the default overruled.

TOWN MAY LAWFULLY VOTE TO INDEMNIFY ITS OFFICERS OR AGENTS for liability incurred in the *bona fide* though erroneous discharge of their official duties, and may vote to raise money for that purpose: *Cushing v. Inhabitants of Stoughton*, 6 Cush. 392; *Fuller v. Inhabitants of Groton*, 11 Gray, 340; *Friend v. Gilbert*, 108 Mass. 412; *Lawrence v. McAtwin*, 109 Id. 312; *Minot v. West Roxbury*, 112 Id. 6; *Gregory v. City of Bridgeport*, 41 Conn. 87; *Pike v. Middleton*, 12 N. H. 280; *Gove v. Epping*, 41 Id. 545; *Merrill v. Plainfield*, 45 Id. 134, all citing the principal case. But this doctrine does not apply where the town has no duty or interest with respect to the act by which the liability was incurred: *Gregory v. City of Bridgeport*, 41 Conn. 87; *Gove v. Epping*, 41 N. H. 545; *Merrill v. Plainfield*, 45 Id. 134. In *Hall v. Holden*, 116 Mass. 176, the doctrine of the principal case was relied on to hold a town liable upon a vote to repay money belonging to an individual which had been paid to its agent, upon a condition, and by him improperly paid into the town treasury. The case is referred to also in *Parks v. Inhabitants of Waltham*, 120 Id. 160, as an authority for the position that where a town has voted to pay for certain services to be rendered, and the services are rendered accordingly, this constitutes a contract upon which the town is liable. So in *Thacher v. Commissioners of Jefferson County*, 13 Kan. 190, it is cited to uphold the doctrine, that where the county commissioners of a county employ attorneys to defend a suit in which the county is interested, an action may be maintained against the board for the compensation of such attorneys.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

HAGEMAN v. SHARKEY.

[1 HOWARD, 277.]

VENDOR MAY MAINTAIN HIS ACTION FOR THE PURCHASE MONEY, without having executed a conveyance of the land, or offered to do so, when the promise to pay is independent of the covenant to make title.

ERROR to the Warren circuit court. The opinion states the case.

Coalter and Warren, for the plaintiff in error.

Guion and Prentiss, contra.

By Court, SMITH, J. This was originally an action of assumpsit, founded upon a promissory note, given by the plaintiff in error to secure the payment of a part of the purchase money of a tract of land, sold by the plaintiff in the suit below to the defendant. Two pleas were pleaded by the plaintiff in error. To the latter, which was a plea setting up an entire want of consideration in the note, there was a general demurrer and joinder, and judgment thereon, establishing the correctness of the demurrer; and the defendant having withdrawn his former plea, and declining to answer over, judgment by default final was entered against him. It is to this decision of the judge upon the demurrer, that exceptions are taken, and we will proceed to investigate the points raised in the argument of counsel: 1. It was insisted that a vendor can not bring an action for the purchase money, without having executed a conveyance of the land, or offered to do so. But we can not assent to this proposition in the extent of its application. When the contracts of the parties are dependent,

this rule will be applicable, but not when the promise to pay is independent of the covenant to make title. The case of *Parker v. Parmele*, 20 Johns. 130 [11 Am. Dec. 253], cited by the counsel for the plaintiff, was a case of dependent covenants. That was an action founded upon an agreement under seal, by which the defendant covenanted to pay so much money as the consideration in the purchase of a lot of land, upon a particular day; and the plaintiff covenanted that, upon the performance of his covenant by defendant, he would convey, etc. There the payment of the money was expressly made to depend upon the previous execution of the deed, and was, therefore, clearly a case of dependent covenants. The other cases referred to by counsel, from Johnson's reports, are likewise cases where promises were dependent, and, therefore, do not sustain the proposition; 2. It was farther contended, that the contracts of the parties in this case, as disclosed by the pleadings, were dependent; that the promise of Hageman to pay the amount of the note sued on, was upon condition that Sharkey should convey a perfect title.

The case of the *Bank of Columbia v. Hagner*, 1 Pet. 455, referred to in argument, which was a suit upon a special agreement to purchase two lots of land; the court held, that in an undertaking of that description, the contracts of the parties are always considered dependent, unless a contrary intention clearly appears; and upon the principle that a different construction would in many instances lead to great injustice. But without remarking upon the obvious difference between an agreement to purchase land, and a contract to pay money, without an express condition embraced in the terms of the contract, we will inquire into the truth of the propositions above stated. The plea in effect sets out that the note sued on was made and executed by the defendant below, in consideration, that the plaintiff had, before and at the time, represented to the defendant, that he was the owner of a certain tract of land, and that the said plaintiff was then and there lawfully seised and possessed thereof, and that he, the plaintiff, was authorized, and had full power to sell and convey the same, and in consideration, that the defendant would then and there execute to him his three notes for one thousand dollars each, one payable on the first of January, 1832, one on the first of January, 1833, and one on the first of January, 1834, the last of which was the one now sued on, the first two of which having been long since paid, the said plaintiff agreed then and

there, and promised to convey to defendant, by good and sufficient title, in fee simple with general warranty, said tract of land; and the defendant averred that, relying on the promises, etc., of said plaintiff as above set forth, that he made said three notes, above described; and the defendant farther averred that at the time of the representations above set forth, and at the time of the creation of the notes, said plaintiff was not lawfully possessed and seised of said land; and that he was not by law authorized to convey the same, and that the said plaintiff well knew at the time of making said representations, and at the time of making said notes, that he was not authorized to convey the land, and that he had not the possession and seisin thereof; and that he well knew that one William R. Bay was in the possession of said land, and held the possession adverse to him, and that he was still in the possession of said land, and has hitherto enjoyed the same in opposition to the wishes of said plaintiff. The contract as above set forth, to wit, "that the plaintiff, in consideration that the defendant would then and there execute his three promissory notes, agreed to convey, etc.," would appear to bring this case within the principle of dependent covenants; if the rules laid down in 1 Pet. be correct, he agreed to execute his notes in consideration that the plaintiff had agreed to convey. The contract here set forth and admitted by the demurrer, is precisely analogous to the agreement in the case above referred to, in 1 Pet. 455, although there are some other facts detailed in the plea, strongly indicating that the promises of the parties were independent: See case of *Mason v Gardner*, 4 Litt. 235.¹

The question then arises, have the pleadings shown a violation of the contract on the part of the plaintiff? We think that they have not. The averments do not allege a failure to make a good and sufficient title in fee simple to the tract of land above described. Nor do they negative the fact that the plaintiff could have conveyed a good and sufficient title in fee simple. It is true the plea contains an averment that the plaintiff was not lawfully seised and possessed of the land, but this averment is not inconsistent with the power of the plaintiff to make a good and sufficient title in fee simple, for a man may have an absolute right in fee simple to lands of which he is neither seised nor possessed. The averment that the plaintiff was not authorized by law to convey, is an improper averment in a plea. A plea must present a matter of fact of

1. *Mason v. Chambers*, 4 Litt. 253.

which a jury can judge as to its truth or falsehood. This averment states a conclusion of law of which the court alone is competent to judge, and is therefore a defective averment. The preceding statement in the plea, to wit, "that the said plaintiff at the time of making said representations, etc., well knew that he was not authorized to convey, etc., the same," is equally defective. If it were the intention of the defendant to shield himself from the demand of the plaintiff, upon the ground of fraud in the sale of the land, it should have been expressly averred that the representations of the plaintiff were made with a fraudulent intention. The reason of this rule is obvious, as it is an intendment of law, that a person is innocent of fraud or deceit, or any other imputation affecting his reputation. The party, therefore, insisting upon a fraud, must state it fully: Co. Lit. 71 b; Chit. Pl. 204. But viewed in a different aspect, it does not present a fact, upon which an issue could have been taken, decisive of the cause. It would have been an immaterial issue.

The judgment must, therefore, be affirmed.

SHARKEY, C. J., gave no opinion.

TENDER OF PERFORMANCE, WHEN NECESSARY: See *Parker v. Parmele*, 11 Am. Dec. 254; *Rector v. Purdy*, 13 Id. 494, note 496; *McCoy's Adm'r's v. Bizbee's Adm'r's*, 27 Id. 258.

STEVENS v. WEST.

[1 HOWARD, 308.]

FIRM CAN NOT RECOVER AS INDORSEES OF A PROMISSORY NOTE SIGNED BY ONE OF ITS MEMBERS, in an action on such note; the remedy of the member of the firm who signed the note is against his co-makers for contribution.

MERE ADDITION OF THE WORD "SECURITY" TO THE NAME OF A JOINT MAKER of a note does not change the nature of his liability, nor is it, in itself, evidence that he stood in that relation to the other contracting parties.

ERROR to Wilkinson county. Assumpsit by the plaintiffs as indorsees of a promissory note executed by the defendants, and C. C. West, one of the plaintiffs, as "security." Plea, the general issue, and verdict for the plaintiffs. On the trial the note was offered in evidence, signed by "Stevens & Pillet," and "C. C. West, security." The defendant, Pillet, asked the court to charge the jury that "if they believed from

the testimony, that C. C. West, whose name is signed to the note sued on, is the same man who is one of the plaintiffs in this action, and he signed the note, the plaintiffs can not recover." The court refused so to charge, and Pillet excepted. A motion for a new trial, made by the defendant, was overruled.

Webber and Dunn, for the plaintiff in error.

Boyd, contra.

By Court, **SHARKEY, C. J.** The plaintiffs in error made their promissory note to Mrs. Connell, who indorsed to West & Hamilton. West had also signed the note with the other makers, and added to his name the word "security." The only question is, can the action be sustained by West & Hamilton as plaintiffs, on the note which West had signed as above stated? West can be regarded in no other light than as a joint maker, and the mere addition of the word security at the end of his name, did not change the nature of his original liability, nor is it evidence in itself, that he stood in that relation to the other contracting parties. When he paid the note, therefore, he was only discharging his own contract and liability, and he had a right to resort to his proper remedy against the other contracting parties for contribution; but his remedy was not on the special contract, it originated from the fact that he had discharged that contract. If he was in reality only a security, and if his being so would give him a remedy on the note, yet he has failed to show it, and in the absence of any such showing, he can not recover on the note, it being a contract which he was equally bound to discharge, and the breach of which was equally a breach of his own duty.

The judgment must be reversed, and *venire de novo* awarded.

In *Debard v. Crow*, 22 Am. Dec. 113, it was decided that obligees in a bond who became sureties to themselves did not thereby incur any legal obligation.

BOHANON v. WALCOT.

[1 HOWARD, 336.]

REVOCATION OF WILL, WHAT AMOUNTS TO.—A testator, by directing several interlineations and erasures to be made in his will, with the avowed purpose of revoking it, and by delivering it in that condition, to a person, to be used as a memorandum in drafting a new will, gives sufficient proof of his determination to revoke such will.

REVOCATION OF A SUBSEQUENT WILL does not, *ipso facto*, revive a former will which had been expressly or impliedly revoked by the latter.

WILL, WHEN REVOKED, HAS NEITHER A PRESENT NOR A POTENTIAL EXISTENCE, and it requires a new testamentary act on the part of the testator to revive it.

APPEAL from the probate court of Warren county. The opinion states the case.

Coalter and Warren, for the appellant.

Chilton and Bodley, *contra*.

By Court, SMITH, J. The widow of George Grissell, deceased, E. D. Walcot and his wife Sarah, filed their petition in the probate court of Warren county, to establish and have admitted to probate, a will of the said Grissell. This proceeding was resisted by Mary F. Bohanon, who sought to establish a subsequent will of the same individual. The probate court, after hearing the proofs in the cause, decided in favor of the prior will, which was therefore admitted to probate. From this decision, the respondent, Mary F. Bohanon, prayed and obtained an appeal to this court. Two propositions cover the whole ground of controversy between the parties: 1. Was the second will of Grissell revoked by the testator? 2. If the second will was revoked, did such revocation, *ipso facto*, revive the former? To decide the first position, it is necessary to examine into the facts as they appear from the record. George Grissell, who then resided in Green county, in the state of Alabama, duly executed and published his will on the twenty-second of April, 1829, by which he disposed of his estate, real and personal; subsequent to which time, he removed to this state, where he became possessed of additional property, both personal and real; and having been induced to believe that the will which he had executed in Alabama, would be inoperative in Mississippi, and desiring to make a different disposition of his estate, he duly executed and published a second will again, and in a different manner, disposing of his whole property. The publication of the second will was made on the twenty-eighth of December, 1831, by which he expressly revoked all former wills and testaments. Some two months anterior to his demise, he expressed an intention of revoking his last will, and again disposing of his effects. For this purpose he applied to William Bacon to write "a new will," presenting at the same time the will of 1831, in which there were interlineations and erasures, which he pointed out, and objected to other provis-

ions of the will. He stated to Bacon, that he had done away that will, and that the interlineations and erasures were made by his directions; and Bacon, having made a memorandum of the additional alterations which he desired to be made, received the will, interlined and erased, as above described, from him as a guide to be used in drafting another. During this interview between Bacon and Grissell, the latter expressed a desire, that, if Bacon should not write a new will, the will of 1829 should go into effect. From this state of facts, two constructions are clearly deducible: 1. That the testator had resolved to revoke the will of 1831, and to substitute another; and, 2. That said will was interlined and erased in several places, by his direction, with the intention to revoke.

The intention of Grissell to destroy the second will, clearly expressed by himself, was rendered still more certain by the delivery of it to Bacon, as a guide or memorandum in drafting a new will. But were these interlineations and erasures such a destruction, cancellation, or obliteration of the will, as to amount to a revocation? The degree of destroying, canceling, or obliterating, necessary to the revocation of a will, is not defined by the statute, but must, I apprehend, depend upon the circumstances of each case.

In the present case, the *animus revocandi* has been clearly proved, and it has been settled by high authority, that the slightest act of tearing or burning, if accompanied by satisfactory evidence drawn *aliunde* of the intention to revoke, will satisfy the statute, and revoke the will: Pow. on Dev. 634; *Burtenshaw v. Gilbert*, 1 Cowp. 49. The case of *Johnson et al. v. Brailsford*, 2 Nott & McC. 272 [10 Am. Dec. 601], is analogous to the case now under consideration. In that case, the jury found that the will of the deceased was found in his private desk; and, that at the time of its being found, the seals with which the said will and codicil had been executed, were torn off, after having been previously crossed with a pencil; and that several interlineations and erasures were made in the body of the will. They also further found that about the time the aforesaid interlineations and erasures were made, the testator directed another will to be drawn out, materially different from the first one, which was accordingly drawn out but never executed; and that further from the declared intention of the testator, that the seals were torn off *cum animo revocandi*. In delivering the opinion in that case, Judge Huger remarked, "that in this case, the jury have found that the will was torn

animo revocandi. It can not be important what part of the will be torn; the seal, though unnecessary to the will, was made a part of it by the testator. The first two or three lines are equally unnecessary, and yet it would not be contested that, if these lines had been torn from the instrument, with intent to revoke, the statute would be satisfied." In the present case, the seals were not torn off, but several interlineations and erasures were made by the express direction of the testator, and for the avowed purpose of revoking the will. There was also a delivery of the erased will to an individual to be used as a memorandum in drafting another. It is true, that the statute of South Carolina, upon which that decision was predicated, is not identical in language with the law of this state on the same subject, but they are so similar in effect, that the difference is hardly appreciable. In the statute of 1789, of South Carolina, the word destroy is used, whereas, in that of this state, the additional words of canceling and obliterating are inserted. But the word "destroy" includes both of the others, for it is manifest that where an instrument is obliterated or canceled, that it must be destroyed. The decision in the case of *John-on et al. v. Brailsford*, must, therefore, be regarded as especially in point, and our opinion on the first proposition is in accordance thereto.

Upon the second position, the decisions are somewhat various. In the *Matter of Hellier*, 3 Atk. 798, it was expressly holden, that a former will, revoked by the creation of a second will, was not revived by the cancellation of the latter. But Lord Mansfield, in the case of *Glasier v. Glasier*, 4 Burr. 2515, remarked, that the report only embraced what took place in the court of chancery; but that there might have been circumstances appearing before the ecclesiastical court, which might amount to a revocation of a will of personal estate, and in the case then under consideration, holds the opposite doctrine. But with due deference to so high an authority, I conceive that his reasoning on the subject is not sound, and that if the decision in that case establishes the position that the revocation of a subsequent will, *ipso facto*, revives a former will, which had been expressly or impliedly revoked by the latter, that it is not law. A will is ambulatory, and has no effect until the death of the testator. If he lets it stand until his death, it is his will, but if revoked, it can not be. But when revoked, it can not be considered as having either a present or a potential existence, and must require some express and direct act of the

testator, which, in fact, does not revive the defunct will, but adopts it as the present will of the testator, and it is to be regarded as a new testamentary act of the party. To this effect is the text in Roper on Wills, 28, and the decision in *Burtenshaw v. Gilbert*, 1 Cowp. 49; Pow. on Dev. 551. It is expressly said in 7 Johns. Ch. 270,¹ that where a will has been revoked, either expressly or impliedly, it is gone forever. The expression of George Grissell, that if the will which Bacon was desired to write for him should not be completed, he desired the will of 1829 to go into effect, can not be regarded as a republication of that will. The wish was contingent, and future in its operation. And if the doctrine above held, and which is fully recognized in 7 Johns. Ch. 270, be correct, it follows that if the intention had not been future and contingent, but present and unconditional, it would not have had the effect to revive the former will.

The judgment must therefore be reversed and the cause remanded.

REVOCATION OF WILL, WHAT CONSTITUTES: See *Gains v. Gains*, 12 Am. Dec. 375, and note 377, where other cases on this subject are collected, and the subject is fully discussed.

1. *Walton v. Walton*; 8. C., 11 Am. Dec. 454.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE *v.* McBRIDE.

[4 MISSOURI, 303.]

SUPREME COURT HAS POWER TO DETERMINE whether or not amendments to the state constitution have been legally proposed and ratified by the legislature, in the manner prescribed by the constitution.

WORD "HOUSE" AS APPLIED TO A BRANCH OF THE LEGISLATURE, means a number of members sufficient to constitute a quorum to do business; and an amendment to the constitution ratified by two thirds of a majority of all the members elected, is ratified by two thirds of that house.

AMENDMENT VACATING OFFICES OF JUDGES OF THE CIRCUIT COURTS of this state, is an independent amendment, and is capable of standing alone.

INFORMATION, in the nature of a writ of *quo warranto*, charging that the defendant did, without any legal commission or authority, exercise and transact certain business, rights, and duties of the office of circuit judge of the circuit court of the second judicial circuit of this state. The defendant pleads a commission of judge of said court, granted to him by the governor of the state on December 11, 1830. To this plea the circuit attorney demurs. The other facts are sufficiently stated in the opinion.

Chambers, circuit attorney, for the state.

By Court, TOMPKINS, J. The question raised for the decision of this court is, whether at the last general assembly, such change was made in the constitution of this state, that on the first day of January, 1836, the defendant ceased to be judge by virtue of the commission set out in his plea: the acts charged against him being done and performed since that time. In the

twelfth article of our constitution, it is provided that the general assembly may, at any time, propose such amendments to the constitution as two thirds of each house shall deem expedient: which shall be published in all the newspapers published in this state, three several times, at least twelve months before the next general election. And if at the first session of the general assembly after such general election, two thirds of each house shall, by yeas and nays, ratify such proposed amendments, they shall be valid to all intents and purposes, as parts of this constitution, provided, that such proposed amendments shall be read on three several days, in each house, as well when the same are proposed as when they are finally ratified. At the last session of the general assembly, certain amendments proposed by the preceding assembly, were acted on and declared to be finally ratified. The first, and that on which the case now before this court must be decided, is as follows: "That the offices of the several judges of the circuit courts, within this state, shall be vacated on the first day of January, 1836."

For the state, it is contended by the circuit attorney, that the proposed amendments being declared by the general assembly to be ratified, it is not permitted to this court to look into the matter to see whether the general assembly have pursued the power granted to them in the twelfth section of the constitution. For the defendant, it is contended that it is the duty of the court to examine strictly the whole matter, and that if on such examination, it be found, that the two houses have not strictly pursued their power, it then becomes our bounden duty to decide that the section above cited is of no effect: and that the commission of the defendant is still in full force, it being to continue in force during good behavior. It is further contended that this amendment proposed by the seventh general assembly, was not ratified by two thirds of the senate of the eighth general assembly, as required by the twelfth article of the constitution of this state, and that the amendment itself was not in itself an independent proposition: that another amendment proposed by the seventh general assembly, on which this is alleged to have been dependent, having failed, this shared its fate. The constitution of this state requires that each officer, whether civil or military, shall before entering on the duties of his office, take an oath or affirmation to support the constitution of the United States and of this state, and to demean himself faithfully in office. In pursuance of the

duty imposed by this oath, it has become quite a common business of the courts to examine the acts of the legislative body, to see whether any of them infringe the constitution, and to declare that such acts or parts of acts as are repugnant to the constitution, are not the law of the land, and are therefore of no force. No educated man at this day denies this right to the courts. On the contrary, it is considered a base abandonment of duty for a judge to hesitate, when it becomes his duty, to examine the acts of the more powerful branches of the government. If, then, the constitution be the supreme law of the land, it becomes the duty of the judge to look into and understand well this first law of the land. The general assembly, acting itself under a power granted by the convention, can only change the constitution in the manner prescribed to it.

Is then, this court, each member of which is sworn to support the constitution, that first law of the land, to be told that they are not to inquire what that constitution is? We are told that this is a matter which the people have confided to two successive general assemblies, and that their declaration of what is done, is to be to us, evidence that the thing is done, they being sworn as well as ourselves, to support the constitution; yet we look into the acts of each general assembly, and if we find any of its acts violating the constitution, we declare such acts null and void. The general assembly, or two general assemblies, in succession, are but public servants, and it is disrespectful to them to say, that their acts will not bear inspection. If then, they will bear inspection, and if, as we believe, they have left behind them evidence of what they have done, why need we, whose duty it is to observe the constitution as the supreme law of the land, hesitate respectfully to approach and examine those proofs, and see if indeed the constitution of 1820 has been changed, or if by neglecting to pursue the course pointed out by the twelfth section of the constitution, they have failed to give to their acts the validity of constitutional acts? To tell us that the people have reserved to themselves the sole right of looking into this matter, is to tell us that we are sworn to support a constitution which we are not permitted to know.

The first objection of the defendant's counsel is, that this amendment did not pass the senate by a majority of two thirds of that house. The senate then consisted of twenty-four members, and it appears that seven voted against and fifteen for it. The question to be solved is, what is the mean-

ing of the word house, as used in the constitution; does it mean all the members elected, or does it mean any number sufficient to constitute a quorum? In the seventeenth section of the third article of the constitution, the word house is mentioned as consisting of all the members elected. "A majority of each house shall constitute a quorum to do business." The word house, is frequently used in the same article as "each house shall appoint its own officers," etc. "Neither house shall, without the consent of the other, adjourn for more than two days at any one time," etc.

To cite further instances, would be useless. The word house, as used in the constitution, may then, either be the whole number elected to that house or a majority of its members. The most common meaning of the word, then, being a number of members sufficient to constitute a quorum to do business, it is our opinion that fifteen members of the senate having voted for this amendment, and seven only against it, two being absent, it was passed by the required number of votes. Next, is it such a proposition as is independent and can stand by itself? We are told by the counsel, that it was proposed in connection with another, and that having fallen, this must be nugatory. The proposed amendment alluded to, is this: "The judges of the circuit court, etc., shall hereafter hold their offices for the term of six years, and until their successors are duly elected, commissioned, and qualified," etc. It is not at all improbable that the seventh general assembly might never have proposed the amendment above mentioned to have been ratified by the eighth, had they not expected this other by them proposed, to have also been ratified. But that they did not intend the one to be dependent on the other, is satisfactorily enough proved by the fact, that they were submitted as separate and distinct propositions; that ratified, is at all events capable of standing alone.

This court, then, being of opinion that the constitution of this state is so changed by the action of the seventh and eighth general assemblies, that the offices of the judges of the several circuit courts within this state, were vacated on the first day of January, 1836; are of opinion that Priestly H. McBride, in discharging the duties of judge of the circuit court of the second judicial circuit, by holding courts, etc., has been guilty of usurpation of office, and do adjudge that he be ousted therefrom. The court further, considering that no evidence has been offered to charge the de-

fendant with any evil intent in this affair, and it being probable that he acted from mistaken views only, will not avail itself of the power given by law, to impose a fine on him, and condemn him to pay the costs only of this proceeding.

Cited in *State v. Perpetual Ins. Co.*, 8 Mo. 381, and in *State v. Stewart*, 32 Id. 380, as an instance of a case in which the court entertained jurisdiction of an information in the nature of a writ of *quo warranto*; in *Murphy and Glover Test Oath Cases*, 41 Id. 381, to the point that public offices and private rights may be annulled by a change in the state constitution; distinguished in *Pacific R. R. Co. v. Governor*, 23 Id. 367; cited in *People v. Starnes*, 35 Ill. 136; and in *Spangler v. Jacoby*, 14 Id. 300, to the point that the supreme court will inquire into the question, whether or not the legislature, in adopting an amendment to the constitution, proceeded constitutionally.

O'FALLON, EX'R OF MULLANPHY, v. DAGGETT.

[4 MISSOURI, 343.]

CITY CAN NOT USE PRIVATE PROPERTY FOR PUBLIC PURPOSES without making just compensation therefor.

GRANT OF LAND BY GOVERNMENT MUST BE INTERPRETED by the law of the country in force at the time when it was made; and therefore a grant, made by the king of Spain, of land bordering on a river, must be interpreted by the Spanish law then in force.

BANKS OF NAVIGABLE RIVERS, GRANTED TO PRIVATE OWNERS, may, by the Spanish law, be used by navigators for the purpose of landing, fastening, and repairing their vessels; but they can not obstruct the owner's enjoyment thereof beyond the reasonable limits of necessity imposed on them at the time.

RIGHT TO REPAIR IS LIMITED TO CASES OF EMERGENCY, and private property can not be seized upon and used for the purpose of repairing, when other places might be obtained that would answer that purpose as well.

MERE CONVENIENCE OF OWNER OF VESSEL WILL NOT JUSTIFY HIM in using, for several weeks, the lands of a private owner on the bank of a navigable river, for the purpose of repairing his vessel, when he might have used the public docks for that purpose.

TRESPASS *quare clausum fregit*, brought by Mullanphy, in his life-time, against the defendants. The defendants pleaded not guilty as to that part of the close bordering on the water's edge of the Mississippi river, and westward sixty feet; and as to the residue of the close westward of that line, they say it is between high and low-water marks; that the Mississippi river is, and was at the time of the alleged trespass, a public highway and a common navigable stream; that the plain where the supposed trespass was committed was a common and public landing, street, and highway, over which all persons might law-

fully pass, and upon which they might land their boats and lade and unlade them at their pleasure; that they landed and moored their steamboat, engaged in the lawful navigation of the Mississippi, at said landing, and there landed passengers and cargo, and that their passengers, agents, and servants passed and repassed over said close, the same being a public landing and street, using the same as they lawfully might, and doing no unnecessary harm; that the said place is within the limits of the city of St. Louis, whose mayor and aldermen were, by act of the legislature, authorized to improve and preserve the navigation of the Mississippi river, within the city, to erect and regulate public wharves and docks, to regulate the stationing and mooring of vessels, and to open up public streets; that the defendants, under a license from said mayor and aldermen, did land their said steamboat at said place, in the manner above stated, which is the same trespass complained of by the plaintiff. Issue was joined on the plea of not guilty, and it was denied that the space within sixty feet was a public highway. The plaintiff then reasserts the injuries of landing and repairing the boat, and other trespasses. On these pleadings the parties submitted the cause to the court sitting as a jury. The court gave judgment for the defendants on the whole record. The evidence on behalf of the plaintiff was, that on the second day of September, 1799, the lieutenant-governor of Louisiana conceded to one Emilien Yosti a piece of land, then just north of, but now within, the limits of the city of St. Louis; the words of the grant bound this concession on the east by the Mississippi river; that this grant was duly confirmed by the American government, and that Mullanphy had a regular title to that part on which the trespass was committed, and that he had taken some trouble to improve the bank and landing for his private use; that the city had laid out a public street along the margin of the river on the land of Mullanphy, but had not actually opened the same; that there was a space between the east border of this street and the water's edge; that the defendants landed their steamboat on this land and repaired the same, and used the street for laying lumber on, and for passing over with wagons, cattle, etc., and built a blacksmith's shop on the strip of ground between the street and the water's edge; that the land was used by the defendants for this purpose for about six weeks. It was also proved that the boat was landed there by the direction of the city authorities. The court, upon

the testimony, decided that the law was that the place where the alleged trespass was committed was a public highway, and the defendants had a right to do what they did.

Spalding, for the plaintiff in error.

Geyer, for the defendants in error.

By Court, McGIRK, J. The claim of the defendants to use this ground as they did, rests on this principle, that the navigable rivers in this state and the banks thereof, below high-water mark, are and of right ought to be public highways, for the purposes of navigation. This principle is conceded by the counsel for the plaintiff, to be correct so far only as the exigencies of navigation may require; and the argument is, that here, there was no exigency of navigation existing to justify the acts of the defendants. To sustain this point for the plaintiff, Mr. Spalding cites and relies on 1 Part. 337; 4 Hall L. J.; 2 La. 200;¹ and the revised code of 1825, sec. 12, p. 201. Mr. Geyer, for the defendants, also relies on the above quotation from the Partidas. The first question will be, whether the city could lawfully lay out a street on private property, this being the property of Mullauphy by the grant of the Spanish government. It is most clear, and not at all disputed by the defendants' counsel, that if the property was in law the private property of the plaintiff, then the city can not use the same for public uses, without making just compensation therefor. It is clear from the record, that no attempt has, on the part of the city, been made to make any compensation for the use of the land as a public street; nothing therefore can be claimed on this ground. The Spanish government granted the land to the water's edge. This grant must be interpreted, understood, limited, and restrained, according to the law of the country, in force at the time when the grant was made. By reference to that portion of the Partidas, before cited, it will be seen that "rivers, ports, and public roads, belong to all men in common, so that strangers coming from foreign countries, may make use of them in the same manner, as the inhabitants of the place where they are might do, and though the dominion or property of banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow thereon, or to refit his vessel, or to put his sails or merchandise there. So fishermen may put and expose their fish

1. Miscited.

for sale there, and dry their nets, or make use of the banks for all like purposes which appertain to the art or trade by which they live." The author then goes on to say, that "all the trees growing on the banks of rivers, belong to the owners of the adjoining estate, who may cut or cause them to be cut down, or do with them whatever they think fit; yet if at the time they are about to be cut down, they find any vessel fastened to them, or about to be fastened to them, they can not immediately cut them down; otherwise they would interfere with the right every man has to use the banks of rivers; but if there is no vessel fastened or about to be fastened to them, then they may be cut down and converted to the owner's use."

Thus stood the law at the time the grant of this land was made to Yosti, under whom Mullanphy holds. It seems, then, that when this grant was made by the king of Spain to Yosti, there existed a public standing law of the country, that whenever the banks of rivers were granted to subjects, such grants were understood as reserving certain common rights to fishermen and navigators. The first right reserved to navigators, was to touch the bank or land and fasten their vessels there to the trees growing on the land. The second right reserved, is to land on the shore and refit their vessels; and the third, is to put their sails or merchandise on the bank. These are all, enumerated by the author, with regard to rights reserved to navigators; they, of course, are to be considered as so much subtracted from the right of the owner of the bank for public uses. When this grant was made to Yosti, we are to understand that the absolute dominion was granted to him, with these exceptions only. It is on the one side argued, that the defendants' case comes exactly within the privilege to repair. On the other side, it is insisted, that this privilege to repair must be understood with several restrictions and qualifications, one of which is, that unless the vessel was on a voyage and needed repairs to enable her to proceed, the owners had no right to select the place they did to repair; and in this case, the vessel was in the public port, and left the same by the direction of the city authorities, to repair in this place. It seems to us, this qualification of the privilege to occupy the bank, when the property is in a private person, is reasonable; the general interests of navigation have been anxiously guarded by most commercial nations, and so they are with us, but it does not follow that the private rights of the people who own the land, are for that reason, to be disregarded. When a vessel is

on a voyage, and meets with any accident, which makes it necessary to touch the bank, she has a right to do so, leaving the bank, when private property, as soon as practicable. We can not see why it is, that the vessel can seize on private property, in the possession and enjoyment of the owner, when other places might do as well. The owner of the tree, when a vessel is tied to it, or about to be tied to it, can not then exercise his general right to use the tree; it would seem reasonable, therefore, that the use of the bank, in a case like this, should be restrained to cases of some sort of necessity, and should be founded on some better reason than the mere convenience of the owners of the boat. To tie a vessel to a tree temporarily, is one thing, but to moor the same permanently at the bank, when the property in the same belongs to a private person, and there to submit the vessel to thorough repairs, is another thing; this requires much time, a large number of men with materials; it requires also the action very often of wagons and teams, and sometimes even houses to be built for the convenience of the workmen.

It is asked by the counsel, if it were lawful to invade the right of Mullanphy, in the way it was done, for one day, why would it not be lawful to do so for a whole year, and even for ten years, if the defendants should choose to be that long in repairing their vessel? No answer was given to this, and we think none founded in justice, can be given to it. The right to repair must, therefore, be limited to cases of emergency, and not extended to cases of mere convenience. Thorough repairs can seldom be made except in public harbors, where materials and workmen can be had; and for this reason, it is reasonable for the public to provide public docks; there every vessel has a right to go to make all sorts of repairs. Why should the owners be at liberty to select my bank, merely because they think that place will suit them best, when the public docks are open to them, and if they are not, they are at liberty to purchase the privilege, and when not on a voyage they are supposed to have full time to do so? That every one should so use his rights as not to injure or molest others in the enjoyment of theirs, is a maxim that well applies in this case. The law of the Partidas, that the owner of the tree on the bank can not use his right when the same is in the lawful use of the navigator, seems to be an exemplification of the maxim. The king of Spain granted the bank to Yosti, and Mullanphy under him is the owner; he must not for that, obstruct the nav-

igation of the river; he can not project piers into the river, nor build houses on the bank, so as to injure the navigation of the same. So on the other hand, the navigator can not obstruct the owner's enjoyment of the same beyond the reasonable limits of necessity imposed on him at the time. In the case before us, the land was occupied about six weeks under pretense of repairing, and to repair it became necessary to build a house and fix therein blacksmith's tools, to employ men and beasts, in considerable numbers, and all for no other reason than that this place suited the defendants better than any other place.

We are for these reasons, of opinion that the circuit [court] erred in deciding the law to be with the defendants. The judgment is reversed with costs; the cause is remanded for a new trial.

Distinguished in *Labeaume v. Poctlington*, 21 Mo. 41.

RIGHTS OF OWNERS OF BANKS OF NAVIGABLE RIVERS: See *Cates v. Wadlington*, 10 Am. Dec. 699; *Arnold v. Mundy*, Id. 356, note 385.

RIGHT OF NAVIGATION IN, SUPERIOR TO ALL OTHER RIGHTS: See *Post v. Munn*, 7 Id. 570.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

STATE v. BUCKMAN.

[8 NEW HAMPSHIRE, 203.]

IN AN INDICTMENT CONCLUDING CONTRA FORMAM STATUTI, where there is no statute upon which it was founded, the conclusion may be stricken out as surplusage, if the offense is known at common law.

THROWING A CARCASS INTO A WELL, thereby corrupting the water, is an indictable offense at common law.

INDICTMENT for knowingly and maliciously putting the carcass of an animal into a well belonging to one Wilson, from which he and his wife were daily drawing water for domestic use, corrupting and poisoning the same, and greatly injuring the said Wilson and his family in health, contrary to the form of the statute in such cases made and provided. Verdict, guilty, and motion in arrest, that there was no statute on which the indictment could be founded.

Gove, attorney-general, for the state.

UPHAM, J. There is no statute upon which this indictment can be founded. By the act "to prevent common nuisances," it is made penal to lay or leave any dead beast or carrion within the compact part of any populous town within this state: 1 Laws N. H. 160, but that statute can not be made to apply to this case. The penalty there affixed bears no proportion to the aggravated nature of the charge here alleged; and there is nothing in that statute to induce us to believe that it was designed to bear upon acts of this character, and there is no other

statute upon which this indictment can be sustained. The allegation being that the offense was contrary to the form of the statute, and there being no statute upon which it is founded, judgment can not be rendered unless the words, against the form of the statute, can be holden as surplusage, and the charge as made shall be found to constitute a common law offense, in both of which particulars it is contended that the indictment can not be sustained. Where an offense as described in the indictment is punishable at common law only, and yet the indictment avers it to have been done against the form of the statute, it was formerly doubted whether the indictment was good at common law. Lord Hale was of opinion that if the offense was not within the words of the statute, and the indictment concluded *contra formam*, it should be quashed, though the offense described was indictable at common law: 2 Hale P. C. 171; *Penhallo's case*, Cro. Eliz. 231; *Cholmley's case*, Cro. Car. 465; 2 Roll. Abr. 82. But in numerous instances since, it has been holden that such words may be regarded as surplusage, and the law on this point may now be considered as perfectly settled in conformity to the later decisions: 2 Hawk. P. C., c. 25, secs. 115, 116; 1 Ld. Raym. 149;¹ 2 Id. 1163;² *King v. Matthews*, 5 T. R. 163; 1 Chit. Crim. L. 289; 1 Saund. 135, n. 3.³ The only objection, then, remaining, is, whether the charge alleged is an offense subject to indictment at common law. There is no question but the respondent was guilty of causing a nuisance of the worst character, and which tended seriously to affect the health of the complainant; but a nuisance which merely affects an individual is not punishable by indictment. The only remedy is by civil suit, and then only in cases where there has been special damage: Co. Lit. 56; 5 Rep. 73;⁴ 3 Bl. Com. 219. There is a provision of the common law, however, for prohibiting offenses which are strongly analogous to this. Thus the selling of unwholesome provisions, or the mixture of poisonous ingredients in food or drink designed for any individual, are indictable offenses at common law, whether done through malice or a desire of gain merely: 2 East P. C. 822; 6 East, 133;⁵ 3 Mau. & Sel. 10;⁶ 4 Camp. 10;⁷ 2 Chit. Crim. L. 557, note. It is not the act of selling which is designed to be prohibited. Furnishing such provisions in any manner, or causing such unwholesome matter to be used, con-

1. *Ess v. Burdett*.2. *Regina v. Wigg*.3. *King v. Dickenson*.4. *Williams' case*.5. *King v. Southerton*.6. *King v. Dixon*, 3 Mau. & Sel. 11.7. *King v. Dixon*, 4 Camp. 12.

stitutes the offense. There can be no question but the mixture of poisonous ingredients with the food or drink of another to such an extent as to impair the health of any individual receiving them, is punishable by indictment at common law; and water infected with the noisome particles and effluvia of a dead animal thrown into it, must partake of a character so poisonous and unwholesome as properly to come within this class of offenses. The fact that it was a wanton and malicious act will not exclude it from offenses of this description. On this ground we have no hesitation that the indictment may be sustained as charging an offense at common law.

Judgment against the respondent.

WENDELL v. JOHNSON.

[8 NEW HAMPSHIRE, 220.]

ENTRY UNDER A LICENSE, AND AN ABUSE of the privilege, do not make the licensee a trespasser *ab initio*.

ENTRY UNDER A CONTRACT FOR THE PURCHASE OF LAND, and a trespass committed thereon, and refusal to complete the purchase, make the vendee a trespasser *ab initio*.

TRESPASS *q. c. f.* The opinion states the case. Verdict for the plaintiff, subject to the opinion of the court.

Goodall and Woods, for the plaintiff.

Bell, contra.

GREEN, J. In case the defendants are justified in entering on the premises, this suit can not be maintained. The gist of the action is the violation of the plaintiff's possession, and all the other acts are merely in aggravation: 3 T. R. 292;¹ 4 Pick. 239.² If the defendants had the plaintiff's license to enter, of which they can now avail themselves, however much they may have abused such license, it would not make them trespassers *ab initio*. It is only an abuse of a license by law that could make them such. The reason assigned for the distinction between a license in law and a license by the party is, that where the law gives an authority it is but reasonable that it should, in order to secure persons who, without their direct assent, are made the objects of it, from all positive abuses of the authority; and whenever it is positively abused, make the same void, and leave the abuser thereof in the same situation as if he had from

1. *Taylor v. Cole*

2. *Rappe v. Barker*.

the beginning acted without authority. But in cases of a license by a party who is under no necessity of giving authority to any person, but has thought proper to give an authority to one who is guilty of a positive abuse thereof, there seems to be no reason that the law should interpose so as to make all that has been done under the authority by him voluntarily given void, because it was his own folly to confide in one who has shown himself not fit to be confided in: 5 Bac. Abr., Trespass. The case shows that the defendants had authority from the plaintiff to enter upon the premises for a particular purpose, to clear a portion of the land in a husbandlike manner; that they took possession, and cut and carried away large quantities of timber from various parts, but no part of it was regularly cleared. It would be doing the defendants no injustice to say that for this abuse of the authority given them they should derive no advantage from it; that, under such circumstances, they should be presumed to have abandoned the authority given them, and to have acted in their own wrong, and be made answerable as trespassers in ordinary cases; but the law seems not to permit us so to consider their acts.

There is another ground, however, on which this suit may be sustained. It is found by the case that the defendant, Johnson, agreed to purchase the land; paid fifty dollars in part of the consideration, and gave his notes for the residue, on which he afterwards paid twenty dollars; but that he ultimately refused to carry the contract fully into effect. The authority to enter and clear a portion of the land was doubtless given the defendant, Johnson, with the view and expectation of his fulfilling the agreement to purchase, and was a part of the same contract; and inasmuch as he has refused to perform that contract, he can not now be permitted to protect himself under it. Such permission would be manifestly unjust towards the plaintiff, and would be enabling Johnson, the defendant, to take advantage of his own wrong. In the case of *Clough v. Hosford*, 6 N. H. 231, which was trespass, the defendant entered upon the land under a contract to purchase—which he refused to complete. He did no acts upon the land but such as he was permitted to do, and the action was sustained solely on the ground of his refusing to carry the contract into effect. In the present case, the defendant, Johnson, not only refused to perfect the contract, but in the first instance violated it by cutting and carrying away the timber without clearing any part of the land, as he had stipulated to do. We entertain no doubt that the

action on this ground is supported; and let judgment be entered on the verdict, deducting the sums paid by the defendant, Johnson, towards the land.

WHEN VENDEE CONSIDERED A TRESPASSER, by reason of some tortious act in fact or in contemplation of law: *Harle v. McCoy*, 23 Am. Dec. 407.

LICENSEE NOT A TRESPASSER, where he goes upon the land of the licensor to remove structures erected under the license: See the note to *Ricker v. Kelly*, 10 Am. Dec. 43.

BURLEY v. HARRIS.

[8 NEW HAMPSHIRE, 233.]

A PARTY CAN NOT BE PLAINTIFF AND DEFENDANT in the same action.

A PARTNERSHIP CAN NOT SUE ONE OF ITS MEMBERS at law.

DEBTOR COLLUDING WITH OUTGOING PARTNER can not obtain from him a discharge of his debt.

UNTIL A FINAL ADJUSTMENT OF ALL PARTNERSHIP ACCOUNTS, and a specific sum due to some one partner, no action can be sustained by one member of a firm against another.

ASSIGNMENT OF ALL PARTNERSHIP DEMANDS to one of the firm, including a claim against such assignor, does not entitle the firm to sue such assignor.

ASSUMPSIT. General issue pleaded. Harris was a member of the firm of Burley & Harris, in whose name this action was brought. Harris assigned the partnership demands to Burley, who agreed to account for the demands, pay the debts, and then divide the profits with Harris. It appeared that Harris had received goods in the name of the firm to the amount of four hundred and ninety-five dollars and eighty-four cents, but it was not proved or admitted that Harris was indebted to the firm. The partnership business is still unsettled. Plaintiff nonsuited, and case submitted for the opinion of this court.

Quincy, for the plaintiffs.

Rogers and Wilcox, contra.

UPHAM, J. The authorities are very clear, that an individual can not stand in the relation of plaintiff and defendant in the same suit. A judgment in such case would avail nothing, as the defendant would have the same right to discharge an execution founded on it as the plaintiff. The question has arisen in numerous instances where an individual has been a member of different firms, in which one firm held claims against the other, and attempted to enforce them at law. Judge Story, in his treatise on equity, says that no suit can be maintained at law in

regard to any actions or debts between two firms, where individuals of the firms are partners in each. In such a case, all the partners must join and be joined; and no person can maintain a suit against himself or against himself with others. The objection is a complete bar to the action. Nay, even after the death of the partner or partners belonging to both firms, no action upon any contract, or mutual dealing, *ex contractu*, is maintainable by the survivors of one firm against those of the other firm; for in a legal view there never was any subsisting contract between the firms, as a partner can not contract with himself: 1 Story Eq. 630; *Bosanquet v. Wray*, 6 Taunt. 597; *Mainwaring v. Newman*, 2 Bos. & Pul. 120; *Jones et al. v. Yates et al.*, 9 Barn. & Cress. 532. In *Eastman v. Wright*, 6 Pick. 316, and *May v. Parker*, 12 Id. 39 [22 Am. Dec. 393], are remarks of the court to the same effect. In the case of *Holmes v. Higgins*, 1 Barn. & Cress. 74, it appeared that a number of persons had associated themselves together, and subscribed sums of money for the purpose of obtaining a bill in parliament to make a railway. It was holden that they were partners, and that a subscriber who acted as a surveyor in their employ could not maintain an action against all or any of the subscribers. Chief Justice Abbott held that the subscribers were partners, and that it was perfectly clear that one partner could not maintain an action against his copartners for work and labor performed, or money expended, on account of the copartnership.

But in this case the partnership effects have been assigned to one of the firm, and it is contended that the assignment should be protected and the holder of the partnership property permitted to enforce all claims in the partnership name. This doctrine is correct. In many instances of dissolution of partnership the remaining partner is, by agreement, exclusively authorized to arrange the joint affairs, and to receive the partnership credits, as the fund out of which to discharge the partnership debts. Where this is the case, and notice, as well of the dissolution as of the private arrangement between the parties, is given, a debtor to the firm can not, by colluding with the outgoing partner, obtain from him a discharge of the debt: *Gow on Part. 275*; *Henderson v. Wild*, 2 Camp. 561; *Skaife v. Jackson*, 3 Barn. & Cress. 421; *Scott v. Trent*, 1 Wash. 77; *Mountstephen v. Brooks*, 1 Chit. 390; *Arton et al. v. Booth*, 4 Moore, 192. The claims of the firm against all persons, other than the partners, may well be enforced under such an arrangement. But until a final adjustment is made of the balance due

on all partnership accounts, or at least until some balance is struck, and a specific sum is found due to some one partner, no suit can be enforced by one member of a firm against another: *Gow* on Part. 88; *Walker v. Long*, 4 Dall. 434;¹ *Murray v. Bogert et al.*, 14 Johns. 318; *Beach v. Hotchkiss*, 2 Conn. 425; *Bond v. Hays*, 12 Mass. 34; *Wilbey v. Phinney*, 15 Id. 116; *Fanning v. Chadwick*, 3 Pick. 420 [15 Am. Dec. 233]; *Brinley v. Kupfer*, 6 Pick. 179; *Foster v. Alanson*, 2 T. R. 479.

No settlement of the partnership claims has been made in this case. The assignment to Burley is in fact a mere power of attorney, authorizing him to collect the partnership demands and apply them in payment of the partnership debts, while he was to hold the balance to be adjusted by the partners. The partner who took upon himself the business of collection, covenanted to account for all the property received; to pay the debts, and to pay the defendant his share of the profits on a final settlement, if the firm should be found to have realized any profits for division. The partnership business as betwixt the partners was left entirely unsettled; and in case of any difficulty in the settlement betwixt them, their claims were to be submitted to the arbitration of individuals designated in the articles of dissolution. There is no pretense then for maintaining this suit, on the ground of any adjusted balance made betwixt the parties. It is a mere naked suit brought by a firm against a partner for an indebtedness to the firm. The suit is, therefore, *felo de se*; the parties on either side upon the record are the same. Should any difficulties arise in the final settlement of the concerns of these partners, there is a plain remedy in equity, where the objections which occur here would not exist.

Suit dismissed, without costs.

ONE PARTNER MAY SUE ANOTHER for his share of the profits during the continuance of the partnership, if the articles thereof provide for a division of profits before its determination: *Rondeau v. Pedesclaux*, 23 Am. Dec. 463. And generally, with respect to actions between partners, see *Kennedy v. McFaddon*, 5 Id. 434; *Murray v. Bogert*, 7 Id. 466; *Duncan v. Lyon*, 8 Id. 514; *Courée v. Prince*, 12 Id. 649; *Bumpass v. Webb*, 18 Id. 34.

THAT A PERSON CAN NOT BE BOTH PLAINTIFF AND DEFENDANT is asserted in *Livingston v. Livingston*, 12 Am. Dec. 684, where the question of an executor suing himself individually is passed upon.

1. *Ocas v. Johnson*, 4 Dall. 424.

MORRISON v. BLODGETT.

[8 NEW HAMPSHIRE, 238.]

FOR THE PRIVATE DEBT OF A PARTNER, partnership property can not be seized under attachment or execution.

PARTNERSHIP EFFECTS ARE A FUND to be applied first to the payment of the partnership debts; and the interest of a partner therein is only his share of the surplus after they are paid.

ONE PARTNER HAS NO RIGHT TO CONVERT the partnership goods to his own purposes.

A PARTNER'S INTEREST IN THE PARTNERSHIP GOODS may be seized and sold under execution, but the goods themselves, or any part thereof, can not be seized.

WHETHER PURCHASER OF SUCH INTEREST is to be considered a tenant in common with the other partners, *quære*.

RECEIPTOR OF ATTACHED PROPERTY can not contest the legality of the contract on which the attachment issues, nor set up that no goods were seized.

A NEW PARTNERSHIP UNDERTAKING TO PAY the debts of the old firm, which comprised some of the same members, will not be permitted to deny a receipt given for the goods of such new firm attached for a debt of the first partnership, nor to allege that such debt was but an individual debt.

ASSUMPT upon an attachment receipt as follows: "Received of William Morrison, deputy sheriff, all the goods in our store of various kinds, all of the value of four hundred dollars, which we jointly and severally promise to keep safe, and deliver them safe and free of expense, to said Morrison, or any other proper officer, on demand, or pay him four hundred dollars." Signed by the defendants Blodgett and Buffum. The writ was served the twenty-first of April, 1834, upon the goods in question, at the suit of Gassett & Co. against one Joseph Dickinson and the said Blodgett as partners, under the name of Dickinson & Blodgett. Judgment had been recovered, execution issued, and demand made prior to this suit. It also appeared that on February 10, 1834, Buffum had bought Dickinson's interest in the firm, agreeing to assume his share of the liabilities thereof.

Bell, for the defendants.

Wilcox, Goodall, and Woods, contra.

PARKER, J. The first question which has arisen in this case, and one which it may be well to have settled, is whether a sheriff may seize and hold partnership property, by attachment, or on execution, upon a demand against one of the partners. The practice which formerly prevailed, of selling on

execution an undivided interest of the debtor partner, in such specific portion of the partnership property as the creditor saw fit to seize, it seems to be conceded can not be supported under the views, now very generally taken, of the rights and liabilities of partnership creditors and partners. But in *Scrugham v. Carter*, 12 Wend. 131, where the sheriff had seized and removed the goods of a partnership, upon an execution against one of the partners, it was held that an action of replevin could not be maintained against him, at the suit of the other partners, or those standing in their stead. One of the reasons suggested for this, is, that each partner is entitled to the possession of the partnership property; and if one excludes the other, no action at law lies—the remedy is in equity. Whether replevin will lie or not, it must not be overlooked that the right of one partner to the possession is, to hold for the purposes of the partnership, and the benefit of the whole, and not a right to sever any specific portion and hold it for his own use, without the consent of the other partners, and against their interest. If it be true, that in case one partner does take a portion of the partnership property, and hold it against the other partners, no action of trespass or replevin can be maintained against him, it will not prove that such partner has a legal right so to do, but only, that by reason of the general control given him over the goods, by the constitution of the partnership, such remedy at law can not be sustained for a violation of his duty as a partner. This, however, will not show that an action might not well be maintained against any third person who should seize the goods on execution for the debt of an individual partner, and exclude the other partners from the possession; when no right existed to hold them in pledge for the debt, or to apply them to the payment of it by a sale on the execution. Such seizure and possession is not within any rights of the debtor partner to exclude the other partners from the possession, nor in furtherance of the purposes of the partnership, but in direct contravention of the rights of the other partners.

Formerly it was, undoubtedly, the practice to levy an execution against one of several partners upon all or a part of the goods which belonged to the partnership. Various cases are found, showing the practice at law to seize the specific property and sell a moiety, or undivided share, of it: *Heydon v. Heydon*, 1 Salk. 392; *Jacky v. Buller*, 2 Ld. Raym. 871; *Bachurst v. Clinkard*, 1 Show. 173; Com. 277;¹ Id. 619;² *Parker v. Pistor*,

1. *Marriott v. Shaw*.2. *King v. Manning*.

8 Bos. & Pul. 288; *Chapman v. Koops*, Id. 289; Id. 254; *Barker v. Goodair*, 11 Ves. 85; *Lyndon v. Gorham and Trustee*, 1 Gall. 368. The language of some of these cases would indicate that the undivided share of the debtor partner, in the goods seized, was sold, without any reference to the debts of the partnership, although Lord Hardwicke understood the cases in *Salkeld* and *Lord Raymond* as holding "that judgment and execution against one partner, for his separate debt, does not put the other in a worse condition, for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him:" *West v. Skip*, 1 Ves. sen. 241. Cases have certainly existed in which a partnership was treated, at law, as a tenancy in common, without reference to a partnership account, so far as it respected such seizure and sale, and as a tenancy in common of each chattel which belonged to the partnership; for in many instances only a part of the goods have been seized, and the undivided share in separate articles has been sold to different individuals: 17 Ves. 205; 2 Ves. & Bea. 301; 1 Story Eq. 629. Some of the early cases speak of a seizure of all the goods of the partnership; but this, evidently, has not been regarded as necessary to the validity of the proceeding. Probably no more was intended than that the sheriff could not divide off and seize a moiety of the goods, and sell all which he seized: *Smith v. Stokes*, 1 East, 367. Although it seems that in *Eddie v. Davison*, Doug. 650, the whole interest in the goods seized was sold, and the sheriff was ordered to pay a share of the money levied to the assignees of the other partner. Comyn says: "If A., B., and C. are partners, and judgment and execution is sued against A., only his share of the goods can be sold. It is true, the sheriff may seize the whole, because the share of each, being undivided, can not be known; and if he seize more than a third part he can sell only a third of what is seized, for B. and C. have an equal interest with A. in the goods seized; but the sheriff can sell only the part of him against whom judgment and execution was sued:" *The King v. Manning*, Com. 619.

Proceedings at law would have been more simple and easier conducted, had this practice been continued; but when the courts of equity adopted the position that the partnership property was a fund, in the first instance, for the payment of the partnership debts—that the interest of each partner in the partnership was only his share of the surplus remaining after the

obligations were discharged, and that the vendee on such sale took *cum onere*, subject to the equities of the other partners, and the creditors, 1 Gall. 369—it became very nearly a matter of necessity for courts of law to change the practice in relation to such sales, although Lord Eldon seems to have expressed something like surprise that they should attempt to administer equity upon the subject: *Waters v. Taylor*, 2 Ves. & Bea. 301; 17 Ves. 206. If the several vendees of an undivided moiety of specific parcels of goods became not only tenants in common with the solvent partner, but held the share of the debtor partner in those goods, subject to a partnership account, and entitled, instead of the definite share of the goods which they had purchased, only to a share of a surplus which might exist in favor of the debtor partner upon the taking of such account, if any there happened to be, or to nothing, if no surplus existed, as the case might be; and were liable to a bill in equity, in which these matters were to be adjusted; there was certainly no propriety in any longer attempting to sell an undivided share of the specific chattels on an execution at law.

The reason and necessity for a change is apparent; the sheriff could no longer convey a specific share of particular goods. If he attempted to sell it, the purchaser, through the intervention of a court of equity, might find that he had taken nothing by the sale. But if the partnership was not in fact insolvent, so that a purchaser might take something, to wit, the debtor's interest in the surplus, that interest was not an undivided interest in any particular goods separated from the mass of the partnership effects; and there would be not only the evils suggested by Mr. Justice Story, as reasons why an injunction should be granted to restrain the sale, 1 Story Eq. 629, but a question might also arise whether, in case the goods remaining in the hands of the solvent partner were insufficient to pay the debts, the several vendees of the separate portions of the goods, sold at different times, on several executions, were to contribute to make up the deficiency, or whether the vendees under the prior execution and sale were entitled to hold the goods, in which they had purchased a contingent interest, until those which had been delivered to subsequent vendees had been exhausted. And if this were decided in favor of the vendees under the prior execution, a similar question might arise among them respecting a priority in the sales to themselves.

There must have been a constant collision between the principles of the courts of law thus administered, and the courts

of equity, in relation to this subject, had the former continued to authorize the sale of an absolute undivided interest in specific portions of the partnership goods upon execution; and it has even been thought that such sale by the sheriff ought to be restrained by injunction: *Vide* 1 Story Eq. 629; 2 Johns. Ch. 548;¹ Gow on Part. [252] 278. If the courts of law are unable to carry out the principles of equity fully, by distributing the joint and separate effects among the joint and separate creditors, respectively, it may be well that they have been disposed to follow the principles established in chancery, so far as the nature of their proceedings will admit, leaving the equity jurisdiction to supply, as well as it may, the deficiency. The principle that the partnership effects are a fund, to be applied in the first place to the payment of the partnership debts, and that the interest of each partner is only his share of the surplus after they are discharged, has accordingly been very generally recognized as a sound principle of law, and has been of very easy application where the separate and the partnership creditors were at the same time striving to satisfy their demands by a sale upon execution. Precedence has been given in such cases to the creditors of the partnership: *Tappan v. Blaisdell*, 5 N. H. 190, and cases there cited; 9 Conn. 410.² But this is not enough. Having established this principle, there seemed to be no longer any ground for authorizing the sheriff to seize and sell an undivided interest in specific portions of the goods of the partnership, upon an execution against an individual partner, even where no execution against the partnership is interposed; and the later authorities hold that he is to sell the interest of the debtor partner.

Mr. Justice Story, in his commentaries on equity jurisprudence, says: "It is well known, that at law an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy, not the moiety, or undivided share of the debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner; but he can levy the interest only of the judgment debtor, if any, in the property, after the payment of all debts and other charges thereon. In short, he can take only the same interest in the property which the judgment debtor would have upon the final settlement of all the accounts of the partnership. When, therefore, the sheriff seizes such property upon an

1. *Moody v. Payne*.2. *Barber v. Hartford Bank*.

execution, he seizes only such undivided and unascertained interest; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interest of the judgment debtor in the property seized. In truth, the sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner himself. But it gives him properly a right in equity to call for an account; and thus to entitle himself to the interest of the partner in the property which shall upon such settlement be ascertained to exist:" 1 Story Eq. 626; *vide*, also, *Dutton v. Morrison*, 17 Ves. 206; 2 Ves. & Bea. 303;¹ Gow on Part. [246] 271; *Crane v. French*, 1 Wend. 313; 12 Id. 133;² *Church v. Knox*, 2 Conn. 516; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Gibson v. Stevens*, Hillsboro, December term, 1834 [7 N. H. 358]. This seems to be a necessary result, from the adoption of the principle before stated. It has been repeatedly said that the creditor can have no greater right than the debtor had; and if "he can take only the same interest in the property which the judgment debtor would have upon the final settlement of all the accounts of the partnership," such interest is not an undivided interest in any particular portion of the partnership property, to be reduced into possession to the exclusion of the other partners, or sold to others: *Young v. Keighly*, 15 Ves. 557. One partner has no right to convert the partnership goods to his own purposes: *Dob v. Halsey*, 16 Johns. 34 [8 Am. Dec. 293]; *Shirreff v. Wilks*, 1 East, 48; *Livingston v. Roosevelt*, 4 Johns. 251 [4 Am. Dec. 273]; *Gram v. Cadwell*, 5 Cow. 489. Although there may be objections to sustaining an action at law if he do so: *Jones v. Yates*, 9 Barn. & Cress. 532.

Nor is it an interest which may be subdivided by the partner, and sold out to divers persons, by a sale of his interest in particular portions of the goods belonging to the partnership, and a delivery of the goods. He has no authority to make such sales, and thereby constitute his several vendees tenants in common with his copartners in different portions of the goods. He has no authority, by an assignment of his interest, to take from the creditors, or the other partners, the right to have their claims against the partnership satisfied out of the property: *Nicoll v. Mumford*, 4 Johns. Ch. 525. Nor to make his assignee a partner in his stead, without the consent of his co-

1. *Waters v. Taylor*.

2. *Serughan v. Carter*.

partners: *Murray v. Bogert*, 14 Johns. 318; *Kingman v. Spurr*, 7 Pick. 238. Such assignment operates as a dissolution of the partnership: *Marquand v. N. Y. Man. Co.*, 17 Johns. 525. In cases where a partner may sell his interest, it would seem that he must sell it entire, and without excluding his copartners from the possession; and if the sheriff sells he must sell, generally, the interest of the debtor in the whole concern, and not his interest in any separate portion of the property. It is admitted, 12 Wend. 131, that the sheriff can not sell the goods. If the sheriff can not sell an interest in specified portions of the goods of the partnership, there seems to be no reason why he should levy upon those goods, and deliver them to the vendee, or why he should in fact reduce them into possession. If "in truth the sale does not transfer any part of the joint property so as to entitle him" (the vendee) "to take it from the other partner," 1 Story Eq. 626, on what principle is the sheriff authorized to seize and hold, to the exclusion of the other partners, what his vendee, after a sale of the interest of the debtor is perfected, can not take from them? If the sheriff sells "only the interest of such partner, and not the effects themselves," 1 Wight. Ex. 50,¹ cited 2 Johns. Ch. 549,² upon what ground shall he seize the effects which he is not to sell? If "the creditors of the partnership have a preference to be paid their debts out of the partnership funds before the private creditors of either of the partners," and this "is worked out through the equity of the partners over the whole funds," 1 Story, 625, that equity should prevent them from being deprived of the means of payment by reason of such seizure by the sheriff, who can neither sell the goods, nor pay the creditors, and against whom they can not proceed, so long as he may lawfully hold the goods.

In *Taylor v. Fields*, 4 Ves. 396, Chief Baron Macdonald, in delivering the judgment of the court of exchequer, says: "The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion that the *corpus* of the partnership effects is joint property, and neither partner separately has anything in that *corpus*; but the interest of each is only his share of what remains after the partnership accounts are taken." And again he remarks: "In law there are three relations; first, if a person chooses for a valuable consideration to sell his interest in the partnership trade, for it comes to that;

1. *King v. Sanderson*.

2. *Moody v. Payne*.

or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference; but in all those cases the application takes place of the rule that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which can not be tangible, can not be made available or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts." And he says further: "If the partner himself therefore had nothing more than an interest in the surplus beyond the debts of the partnership upon a division; if it turns out that at common law that is the whole that can be delivered to, or taken by, the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy, all that is delivered to the creditor taking out the execution is the interest of the partner in the state and condition he had it," etc.

In *Smith's case*, 16 Johns. 106, the court, after saying that the separate creditor takes the share of his debtor in the same manner as the debtor himself had it, and subject to the rights of the other partner, add: "The sheriff therefore does not seize the partnership effects themselves, for the other partner has a right to retain them for the payment of the partnership debts." And in *Crane v. French*, 1 Wend. 313, Chief Justice Savage, after considering the subject, says: "The sheriff therefore sells the mere right and title to the partnership property, but does not deliver possession:" *Vide*, also, 5 N. H. 193;¹ 2 Conn. 516, 517.² The conclusion, that the sheriff upon an execution against one partner is not to deliver to his vendee, and is not to seize the partnership effects, is sustained, therefore, not only by the reason of the thing, after the adoption of the general principle before stated, but by express authority. There is undoubtedly a difficulty in making a sale of the entire interest of one partner upon execution, without the aid of equity in taking an account before the sale, because, ordinarily, it can not be known until an account is taken what is the value of the interest to be sold. But this difficulty can not change the right of the creditor to have the interest of his debtor, whatever it may be, appropriated to the payment of his debt; and although, in the usual course of sales on execution, at law, no time can be given for such account after a seizure upon the

1 *Tappan v. Blaisdell*.

2 *Chase v. Chase*.

execution, it is generally for the interest of both creditor and debtor that the full value should be obtained upon such sale, and this part of the matter may perhaps be well left to their superintendence and management: *Moody v. Payne*, 2 Johns. Ch. 548. If the interest of the debtor partner only is to be sold, there can be no reason why equity should interfere by way of injunction to restrain the sale, on account of the interest of the other partners.

There are other difficulties attending this subject, some of which can not, perhaps, be fully obviated without legislation. It would seem that, like bankruptcy in England, such sale must operate, *ipso facto*, as a dissolution of the partnership: 17 Johns. 529, 535;¹ and several of the authorities before cited say that the purchaser becomes a tenant in common with the other partner, and takes the undivided share subject to the rights of the other partner: *Fox v. Hanbury*, Cowp. 449; *Gow on Part.* [285] 310, [365] 391; *Skipp v. Harwood*, 2 Swans. 586. If the purchaser is to be regarded as a tenant in common with the other partner, of the partnership goods, he may perhaps have the ordinary rights of such tenant, and be entitled, like the assignees in bankruptcy, to hold such of the goods of the partnership as may come to his hands, subject to the account: *Murray v. Murray*, 5 Johns. Ch. 70. There are, however, expressions in some of the cases indicating that such sale would give the purchaser no right to take possession of any of the goods, but only to demand an account: 16 Johns. 106, 109;² 4 Johns. Ch. 525;³ 2 Conn. 517;⁴ and perhaps the same duties do not devolve on him as upon an assignee, or the same rights accrue to him. In other questions we have less of authority to aid us. The mode in which service of the writ is to be made, under our attachment laws, so as to secure to the creditor, in the best manner, the full value of the interest of his debtor, as then existing, has never been determined. "Chattels which can not lawfully be seized on execution, can not lawfully be attached:" *Pierce v. Jackson*, 6 Mass. 243.

Whether under our present laws the creditor can do more than return a general attachment of the interest of his debtor in the partnership, and summon the other partners as his trustees; and what are the effects of such a service upon the rights and duties of the other partners, and of course upon the action of the debtor himself?—Whether it can suspend his right to inter-

1. *Marquand v. N. Y. Man. Co.*

2. *Smith's case.*

3. *Nicoll v. Mumford.*

4. *Church v. Knox.*

fere with the partnership property so long as the attachment exists, or whether he may proceed to act as partner until judgment and sale upon execution?—And whether, after an attachment, the creditor or any of the partners may maintain a bill in equity for an account before a seizure and sale of the interest of the debtor on the execution?—are questions which may arise, but upon which this case does not call for an opinion.

We might have declined to express an opinion upon the matters already considered. These defendants are in no situation to contest the right of a creditor of one partner to attach the partnership goods. Prior to the time when this attachment was made, the goods attached belonged to the firm of Dickinson & Blodgett, and the debt on which they were attached was a partnership debt due from them. Buffum, one of the defendants, purchased the interest of Dickinson, and agreed to pay his share of the debts and indemnify him against them. Blodgett & Buffum—having continued the business as partners—being the persons who ought to pay the debt—and having the property which was formerly liable for its payment—and the sheriff having seized that property—gave this receipt, undertaking to deliver the goods or pay the money, and the sheriff thereupon returned an attachment. There is no principle, equitable or legal, upon which they ought now to be permitted to set up this defense, and avoid their contract. It may be considered as equitably the partnership debt of the defendants. They are the very persons who ought to pay, and whose goods ought, in justice, to be taken, and the goods actually taken were those upon which the debt ought equitably to be charged.

We should have hesitated long, under such circumstances, before holding that these goods could not lawfully be attached upon this demand, had no receipt been given. But when the defendants, instead of contesting the right of the officer to attach, assented to it; undertook to return the goods or pay the money; and the officer thereupon returned an attachment, all question upon the matter was put at rest. It is not competent for them under these circumstances to avoid this contract. In fact, it is not necessary for the plaintiff to rely upon the circumstances existing before the attachment. The authorities cited by his counsel show it to be well settled, that where an officer has made a nominal attachment, taking the receipt of a third person, and returning the goods as attached, the receptor is responsible, and can not defend upon the ground that no goods

were in fact seized, and that his contract was without consideration: 11 Mass. 219;¹ Id. 319;² 14 Id. 195;³ 2 Vt. 212;⁴ 4 Id. 505;⁵ Story on Bail. 95; 8 Wend. 614;⁶ 12 Pick. 144.⁷

Judgment for the plaintiff.

LEVY ON PARTNERSHIP PROPERTY FOR PARTNER'S PRIVATE DEBT.—The principal case correctly states the law as administered in New Hampshire with respect to the manner of satisfying a judgment obtained against an individual partner, out of the firm effects. "A sheriff upon a demand against one partner for his private debt can not seize the goods of the partnership, and exclude the other partners from the possession:" *Gibson v. Stevens*, 7 N. H. 352; *Morrison v. Blodgett*, the principal case; *Newman v. Bean*, 21 Id. 93; *Hill v. Wiggin*, 31 Id. 292; *Treadwell v. Brown*, 43 Id. 290; *Garvin v. Paul*, 47 Id. 158. This ruling is undoubtedly opposed to the weight of the early authorities, which are almost unanimous in affirming that the officer may levy on the interest of a partner, assume exclusive possession of the chattels of the firm, and retain it until the sale: *Bachurst v. Olinkard*, 1 Show. 173; *Mayhew v. Herrick*, 7 C. B. 229; *Parker v. Pistor*, 3 Bos. & Pul. 288; *Pope v. Haman*, Comb. 217; *Heydon v. Heydon*, Salk. 392; *Johnson v. Evans*, 7 Man. & G. 240; *United States v. Williams*, 4 McLean, 236; *Newhall v. Buckingham*, 14 Ill. 405; *White v. Jones*, 38 Id. 159; *Davis v. White*, 1 Houst. 228; *Andrews v. Keith*, 34 Ala. 722; *Smith v. Orser*, 42 N. Y. 132. Some recent adjudications recognize and sustain this right of the sheriff to assume exclusive control over partnership property under an execution against a partner for his individual debt: *Clark v. Cushing*, 52 Cal. 617; *Saunders v. Bartlett*, 12 Heisk. 317; *Eighth Nat. Bank of N. Y. v. Fitch*, 49 N. Y. 541; *Atkins v. Saxton*, 77 Id. 195; *Hacker v. Johnson*, 66 Me. 21; *Parker v. Wright*, Id. 392; *Fogg v. Lawry*, 68 Id. 78. Though in all these decisions the sheriff may actually take the partnership goods, yet he can not sell more than the debtor's interest therein. Should the sheriff undertake to sell the entire property, his act would be nugatory, and he would be a trespasser *ab initio*: *Atkins v. Saxton*, 77 N. Y. 195.

Of course, the question immediately presents itself, if the goods can not be sold, why seize them? Why is it not sufficient to levy upon that only which may be made the subject of a sale? This brings us to the New Hampshire doctrine, as stated in the principal case, and expressly dwelt upon in *Treadwell v. Brown*, 43 N. H. 290—that only the interest of an individual partner in the firm effects may be attached or seized on execution and sold. This view is growing in favor, and seems amply supported by principle. Neither partner has exclusive right to the possession of any or all of the firm effects; how, then, can a creditor of a partner claim that right? The interest of each partner, that is, his share in the balance remaining after payment of the firm obligations, of course is seizable, but on no ground can more be taken. Moreover, the rights of the copartner ought to be considered. Why should his interest be seized, as it must be if any specific chattel is taken under the writ, because another who is associated with him in business happens to be in debt? On what reason can the partner not sued be placed in a worse condition by his copartner's creditor than he could be put

1. *Jewett v. Torrey*.

2. *Lyman v. Lyman*.

3. *Bridge v. Wyman*.

4. *Spencer v. Williams*; S. C., 19 Am. Dec. 711.

5. *Lowry v. Cady*; S. C., 24 Am. Dec. 628.

6. *Phillips v. Hall*; S. C., 24 Am. Dec. 108.

7. *Hedge v. Drew*; S. C., 22 Am. Dec. 416.

by the copartner himself? These considerations all lead to the conclusion, adopted by several courts, that an officer, under an execution against an individual member of a firm, can not seize and take into his exclusive possession specific articles belonging to the firm, but, at most, can only seize the interest of the partner, whatever it may be, subject to all the partnership debts and to the final accounting: *Sirrine v. Briggs*, 31 Mich. 443; *Haynes v. Knowles*, 36 Id. 407; *Hutchinson v. Dubois*, Sup. Ct. of Mich., 11 The Rep. 227; *Kuerr v. Hoffman*, 65 Pa. St. 126; *Vandike v. Roskam*, 67 Id. 330; *Ohoppin v. Wilson*, 27 La. Ann. 444; *Levy v. Cowan*, Id. 556. See also Freeman on Executions, sec. 125.

POOR v. POOR.

[3 NEW HAMPSHIRE, 307.]

DIVORCE WILL BE DENIED where the conduct alleged as ground therefor was provoked by the actions of the libelant.

EXTREME CRUELTY is not austerity of temper, petulance of manners, rudeness, lack of attention, or sallies of temper, if there be no threat of bodily harm.

ANY WILLFUL MISCONDUCT OF THE HUSBAND which endangers the life or the health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty.

IDEM.—**MANY ACTS ARE NOT NECESSARY** to constitute such cruelty; whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe.

THE CRUELTY LAYING A LEGAL FOUNDATION for a divorce must be unmerited and unprovoked.

LIBEL filed by a wife for a divorce on the ground of extreme cruelty. The opinion states the case.

Emery and Bartlett, for the libelant.

James Bell, contra.

By Court, **RICHARDSON, C. J.** The parties in this case were married on the seventh of March, 1816. They have no children. The husband is proved to be a man in easy circumstances, and of a hasty and irritable temper. The wife is shown to be a very active and efficient manager of her household affairs, and of a high, bold, masculine spirit; somewhat impatient of control; in a high degree jealous of the liberty that belongs to her as a wife, and not always ready to submit, even to the legitimate authority of her husband. For aught that appears in this case, they lived in peace and harmony, without any serious difficulty, until some time since the year 1830, when the wife, having become a professor of religion, united herself to a church whose doctrines and opinions the husband did not ap-

prove. And this diversity of sentiments in religious matters seems to have been the original fountain whence has flowed all the bitterness which has since existed between them, and which has driven them into quarrels, squabbles, and encounters, that certainly do no credit to either party. The result of these broils was, that the wife left the house of the husband, and has since resided separate and apart from him; and she now claims to have the bonds of matrimony dissolved, on the ground that in the contest which ended in their separation, he exercised a tyranny over her which amounted to extreme cruelty. In a contest about religion between two persons standing in the relation, and having the dispositions and tempers of these parties, it is hardly to be conceived that the blame could have been all on one side. Mere profession of religion weighs nothing in such a case. If the spirit of the gospel abide with one of the parties, not in word only but in its power, there can be no contest; whatever wrong or injury there may be on the one side—all will be patience and suffering on the other. Where strife is, there is every evil work. But that wisdom which is from above is first pure, then peaceable, gentle, and easy to be entreated, full of mercy and good fruits. This is the language of inspiration. The evidence in this case shows much strife between these parties; and an attentive examination of that evidence will enable us to see who has been to blame.

One of the complaints of the wife in this case is that the husband has often addressed her in harsh, abusive, and profane language. This charge is sustained by the evidence, and his conduct in this respect can be viewed in no other light than as unmanly, indecorous, and in the highest degree reprehensible. And in the case of a woman of a meek and quiet spirit, incapable of rendering evil for evil, or railing for railing, but patient in all her tribulations, such language on the part of a husband, often repeated, wantonly and unprovoked, would go a great way, and be a circumstance of much weight, in making out a case of extreme cruelty.

But here much of the evidence on both sides, and even the tone and temper of the affidavit which she has drawn up herself and filed in the case, indicate in the wife anything rather than a meek and quiet spirit. And one of her own witnesses says that her conduct was often provoking and vexatious. She herself admits, in her affidavit, that she sometimes used passionate language, but says she used it only when he gave her occasion. It is very likely that she may think she had always

an occasion for the passionate language she used; and it is equally likely that he may think he had an occasion for the harsh and abusive language he used towards her. It is not proved that he used such language wantonly and unprovoked on any occasion. And if a wife chooses so to act and to talk as to raise a storm in the temper of an irritable husband, it is doing her no injustice to say to her, when it has come attended only with harsh and abusive language, that she has had in its peltings her just and merited reward. However reprehensible his conduct may have been in this respect, she is not to be heard, when she would complain of it. She ought not to be heard to complain of abuse which she has wantonly provoked. Her next complaint grows out of a contest between them with respect to some wood, in August, 1833. Her story is that she sent a little girl out to procure some wood—that Poor met the girl at the door and told her “she should not”—that she then went herself for the wood, and as she went out, he went into the house. When she returned she found the door fastened—upon which she threw her wood into the house through the window, and took a crowbar and knocked at the door; that Poor came out in a great passion, and using very profane language, which she repeats, but which we shall not, took the crowbar from her by force; that she screamed murder, and he stopped her mouth. But at length she escaped, and soon after deserted the house.

Now in this account it is virtually admitted that she went out in open rebellion against the known will of her husband. And the throwing of the wood into the house by the window, the use she made of the crowbar, and her screams of murder when he took the bar from her, indicate a spirit and temper quite too belligerent, when indulged against a husband, to be becoming in a lady. But her witness, Palmer, adds other material circumstances, which she has omitted. Palmer says that Poor told the girl not to take the wood that was on the other side of the road, but to take it from the mill-house, because he wanted to clear that—that upon this Mrs. Poor came out and said that she sent the girl, and intended to have the wood. He further says, that she struck the door with the crowbar and made several dints in it, which are still visible; and that after Poor took the bar from her she threatened to go to a magistrate and compel him to give sureties of the peace, and that Poor told her she had better go into the house. Such is the transaction, as it stands disclosed in the evidence. There seems to have been nothing

unreasonable or improper in the direction which the husband gave to the little girl. And the temper in which the wife went forth from the house, and her declared intention of having her own will and her own way, in defiance of him, which was immediately carried into overt acts of rebellion against his authority, show her to have been entirely in the wrong on that occasion. She was to blame in the beginning: and she carried out the quarrel in a manner which all candid and impartial minds must pronounce to have been equally inconsistent with her connubial duties and her religious professions. In the skirmish which ended in his taking the crowbar from her, she seems to have encountered some of

“The perils that environ
The man that meddles with cold iron,”

and to have been rather roughly handled. But considering the irritable temper of the husband, it seems to us that she escaped with quite as little injury as she could have had any right to expect, in such an attempt to take his castle by storm.

Her next complaint is founded upon a quarrel between her and her husband which took place upon the Sabbath. The account which she gives of the matter in her affidavit is, that she asked Poor to let her have the horse and chaise to go to church. This he refused, because he did not like the minister. She then ordered the boy to put the horse to the chaise, and went out herself to the chaise-house to assist the boy. Finding the chaise-house locked, she requested Poor to let her have the key, which he refused. She thereupon took hold of the door, “and made as though she would open it.” Upon this Poor came out and struck her upon the head, and made her head ache for several days. Such is her account of the affair. But her witness, Palmer, states other material circumstances, which she omits. He says that she went out to the chaise-house and attempted to force the lock with a wedge; that Poor came out, and took the wedge from her, and ordered her to go into the house. She, however, still persisted in her attempt to obtain the chaise, until Poor struck her. Now, in this instance, the quarrel had its origin in the misconduct of the husband. No good reason is shown why the use of the horse and chaise should not have been freely accorded to her. And his refusal of her reasonable request, not only has the appearance of great unkindness, but of a tyrannical attempt to embarrass her in the enjoyment of that religious liberty which belongs to every wife.

But it was the Sabbath—and, under the circumstances, what

course of conduct did duty prescribe to a Christian wife and to a member of the church? The very essence of the religion she professes is, that charity that suffereth long and is kind, which vaunteth not itself, doth not behave unseemly, is not easily provoked, and not only believeth and hopeth, but beareth and endureth all things. What course of conduct, then, did duty prescribe to one who professed to have adopted that religion as the guide of her life? If when ye do well and suffer for it, ye take it patiently, this is acceptable with God, says the bible. What course of conduct did duty then prescribe to one who professes to believe the bible to be the word of God? In my judgment, there can not be any diversity of opinion on these questions. It was due to the day, it was due to the religion she professes, it was due to the relation in which she stood to her oppressor, that, if she could not obtain his consent by kindness and condescension, she should have submitted in silence to the wrong he was doing her. But instead of this, regardless of the day and of the modesty and of all the sober virtues that belong to the character of a pious matron, at the head of a respectable family, and setting her husband completely at defiance, she at once undertook to accomplish her purpose by force and violence; and in this course she persisted, until, provoked by her perverse obstinacy, the husband was led so far to forget himself as to strike her.

Whatever the old books may say upon the subject, there never was, in my opinion, in the relation between husband and wife, when rightly understood, anything that gave to a husband the right to reduce a refractory wife to obedience by blows. And at this day the moral sense of the community revolts at the idea that a husband may inflict personal chastisement upon his wife, even for the most outrageous conduct. The blow given by the husband in this case deserves the severest censure. All must condemn it. But I am much mistaken if the stubborn obstinacy with which the wife set him at defiance, and the violence she used in her rebellion against his authority, will not, under all the circumstances, be quite as revolting to the moral sense of an enlightened and a religious community as the unmanly conduct of the husband.

She farther complains of personal violence, inflicted by the husband in the quarrel about making matches. The account she gives of the transaction in her affidavit is, that while she was making the matches, according to his directions, and obeying him in all things, he, without any provocation, became vio-

lently enraged, and having beaten her cruelly with a horsewhip, imprisoned her in the cellar. Her story is confirmed in some particulars by Palmer, who says he heard a dispute between the parties, and two blows of a whip, and saw her come up from the cellar. And Caswell says he saw Poor strike her two or three times with a whip, but not very heavily. He also saw Poor carry her into the cellar. This witness further says that the parties talked very angrily. Elizabeth Jewell says she heard blows of a whip and afterwards saw marks of violence upon the person of Mrs. Poor. She has another complaint of personal chastisement, inflicted by the husband, in the dispute about certain papers belonging to the society for educating pious young men, of which society she was treasurer. Her account of this affair is, that Poor took the papers from her drawer and put them into his desk; that she demanded them, and he refused to restore them; that a few days afterwards she had an opportunity to obtain possession of them, in his absence, and took them away. When he came home and was informed of this, he flew into a violent passion, and using very profane and abusive language, finally horsewhipped her. Her account is, in some respects, confirmed by the testimony of Elizabeth Jewell, who heard the blows, and afterwards saw marks of personal violence. Such is the case presented by the evidence laid before us on the part of the wife. And I shall, in the first place, consider whether, upon the case thus presented, she is entitled to the decree she asks. It then becomes necessary to consider the true nature of the relation between husband and wife, and what is to be deemed extreme cruelty, within the meaning and intent of the statute.

In scripture the wife is represented as standing, in some respects, in the same relation to the husband as the husband stands to the Redeemer, and the Redeemer to God. The words are: The head of every man is Christ, and the head of the woman is the man, and the head of Christ is God. And in our law the wife is considered as being, in some respects, subordinate to the husband, who is the head of the house. The husband and wife are, in the contemplation of the law, one. Her legal existence and authority are suspended during the continuance of the matrimonial union. All her personal property vests in him, and he is bound to support and maintain her in a manner suitable to her situation and his condition. He is made answerable for her debts contracted before the marriage. And during the continuance of the union he alone is respon-

sible for crimes committed by her in his presence—the law not considering her, in such a case, as acting by her own will, but by his compulsion. He is answerable for all torts and frauds committed by her; and if committed in his company he alone is answerable. And she is wisely made subject in many things to his authority, as he is subject to the laws under which he lives. But a wife is neither the slave nor the servant of a husband. He is the head of the house, to whom as such she is subordinate. But she is at the same time his companion, the partner and sharer of his fortune, in many respects his equal; who in her appropriate sphere is entitled to share largely in his authority. And he is bound, not only to honor and support her, but to accord to her freely and liberally all her rights, and to guarantee to her the full and free enjoyment of all her just privileges and prerogatives as the mistress of the family. In a particular manner he is bound to leave her free to enjoy her own religious opinions, and worship God according to the dictates of her own reason and conscience; and not to molest or restrain her in this respect, provided she does not in her zeal disturb the public peace, nor rebel against his lawful authority. Such is the equality and dignity which our laws confer upon the female character; and such the relation in which husband and wife stand to one another.

What then is extreme cruelty? It is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, or even occasional sallies of temper, if there be no threat of bodily harm. It is not the denial of little indulgencies or particular accommodations. Such denial may in many cases be extremely unkind and unhandsome, and disgraceful to the character of a husband, and yet not amount to the cruelty intended by the statute. To constitute extreme cruelty in a husband, his misconduct must be such as to show that the inward knot of marriage, which is peace and love, is untied, and that he exercises over his wife, not the mild and salutary authority of a husband, but a harsh and cruel tyranny. In the judgment of the law, any willful misconduct of the husband, which endangers the life or the health of the wife; which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty. And in order to amount to such cruelty it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered as safe:

2 Kent Com. 126; *Smith v. Smith*, 1 Eng. Ecc. 232; *French v. French*, 4 Mass. 588; 2 Paige, 502;¹ 7 N. H. 196;² *Hulme v. Hulme*, 2 Eng. Ecc. 208. But it is a well-settled rule, that a wife is not entitled to be divorced on the ground of ill treatment received from her husband, if that ill treatment has been drawn upon her by her own misconduct. The cruelty which lays a just and legal foundation for a divorce, must be unmerited and unprovoked. When she is ill treated on account of her own misconduct, her remedy is in a reform of her manners, unless the return from the husband is wholly unjustified by the provocation, and quite out of proportion to the offense: 2 Eng. Ecc. 163, 164;³ *Holden v. Holden*, 4 Id. 452.

Such are the rules of law that are to govern this decision; and there is very little difficulty in the application of them to the facts in this case. With respect to the quarrels and contests between the parties about the wood, and about the horse and chaise, there is no doubt. Whatever may have been the ill treatment which the wife received on these occasions, it is very manifest she drew it down upon herself by her obstinacy and ill conduct. Nor does the return made by the husband appear to have been much out of proportion to the offense. With regard to the quarrel about the matches, it is very clear that such was the conduct of the husband on that occasion, that if it is to be considered as altogether wanton and unprovoked, it entitles the libellant to the decree she asks. To beat a wife with a whip, and then put her into the cellar without any provocation, is both unjust and tyrannical; and, even in a case of great provocation, it could hardly be considered as manly conduct. It is not denied that he struck her with a whip, or that he put her into the cellar; and she states in her affidavit that she gave him no provocation whatever. This, however, is denied by him in his affidavit. The parties were alone when the quarrel began, and no other person knows in what it originated. It is proved that both very soon became very angry. It is not at all probable that all the fault was on one side. Nor is it likely that he would have proceeded to blows if there was no provocation, but all was submission on her part. The proofs which are in the case of her conduct and spirit on other occasions, render it quite improbable that she was at this time beaten and abused for her meekness and condescension. Besides, we have had an opportunity to compare her accounts of other transactions between herself and her

1. *Perry v. Perry*. 2. *Harritt v. Harritt*; 8. O., 26 Am. Dec. 730. 3. *Best v. Best*.

husband, with the accounts which her witnesses give of the same transactions; and this comparison shows very clearly, that however fair her general character for truth and veracity may be, very little reliance can be placed upon her statements, when they relate to her disputes with her husband.

Perhaps it would be too much to expect that she should, under the circumstances, give a full and fair account of those transactions. It is certain, if her witnesses are to be believed, her accounts are neither full nor fair; and we can not presume that her account of the occurrence we are now considering, is perfectly correct. We entirely condemn the use of the whip by the husband, as unlawful and unmanly. But no very serious injury was done to her person; and her own affidavit, unsupported as it is by any other testimony, has failed to satisfy us that the conduct of the husband was wanton, unprovoked, and unmerited, which is essential, to make it a legal ground of a divorce: 2 Eng. Ecc. 163. Indeed, taking all the testimony together, it seems to us to be rather more probable, on the whole, that she may have designedly used means to provoke him to acts of violence, in order that she might have a pretence for leaving him, than that, wantonly and unprovoked, he inflicted personal chastisement upon her. The same remarks, to a very great extent, are applicable in all their force to the quarrel between the parties about the papers belonging to the society for educating pious young men. The parties were alone during the whole contest, and they alone know the spirit and temper in which it proceeded. There are, however, two circumstances to be considered in this instance, which did not exist in the contest about the matches. The wife was the treasurer of the society, and to take the papers from her without her consent and lock them up in his desk, certainly had the appearance, not only of unkindness, but of an unmanly meddling in a concern which was exclusively under the management of the ladies who belonged to the society, and must have been calculated to vex and irritate the wife. On the other hand, her taking advantage of his absence to open the desk and take away the papers, has in it too much of the *flectere si nequeo superos Acheronta movebo*; too much of a disposition to have her own will, and her own way, by foul means if not by fair, to be commended in a wife, and was calculated to exasperate her husband.

Now, considering the temper and disposition this lady is proved to have exhibited on other occasions, what is the probability as to her course of conduct when the husband came to

reproach her for taking away the papers from his desk in his absence? Did she endeavor to avert the gathering storm by meek and submissive behavior, or did she retort upon him his unmanly interference in the concerns of a female society, with which he had nothing to do? It seems to us much more probable that he was driven to violence by her provoking taunts—taunts which may have been the more provoking, because he felt in them the sting of truth and justice—than that he should have resorted to blows without any new provocation on her part at the time. And this presumption is much strengthened by the consideration, that the husband, although quick and hasty in his temper, does not seem to be naturally vindictive; while the wife is shown to have been at other times quite as busy and active in a quarrel with her husband, as in the management of her ordinary household affairs. And we are of opinion, on the whole, that however obnoxious to censure the conduct of the husband may have been on any, or on all the occasions to which we have alluded, the wife has no right to complain; because it is in the highest degree probable that in every instance she drew down upon herself the chastisement she received, by her own improper conduct. And it does not appear that on any occasion the injury she received was much out of proportion to her offense. Her remedy is to be sought, then, not in this court, but in a reformation of her own manners. Let her return to the path of duty; and if to a discreet and prudent exercise of her just rights and privileges as a wife, she will join that meekness, patience, and kindness which the religion she professes inculcates, and temper all her conduct towards her husband with that sweetness and goodness which belong to the true character of a wife, we think she will have no reasonable ground to apprehend any further injury to her person. Let her submit to the authority of her husband, and remember that the dignity of a wife can not be violated by such submission. Let her return to the path of duty; and by displaying in all her conduct the mild and gentle spirit of the gospel, make that path a path of peace and safety.

And let the husband recollect that the first duty of the head of a family is to be master of himself, and to have his temper and feelings in due subjection to his reason and understanding, so that no provocation shall drive him, on any occasion, to unjust and unmanly acts of violence, or even to the use of profane and abusive language. And remembering his own infirmities, let him generously go forward, and not only invite but en-

courage his wife to return to her duty, by satisfactory assurances, not only that her person shall be safe, but that her feelings shall not be insulted again by profane or abusive language, and that her religious rights shall not be in any way abridged. And let all those who attempt to advise them, consider who it is that has said, "Blessed are the peacemakers, for they shall be called the children of God." Between these parties there is much to be forgotten and forgiven on both sides. But if they shall be disposed to retrace their steps; and if those who are around them shall aid and encourage them in all their attempts at reconciliation, it is to be hoped that they will encounter no serious obstacle in finding their way back to domestic peace and happiness.

CRUELTY AS GROUND FOR A DIVORCE.—By the canon law, cruelty was made a ground for a judicial separation of the husband and wife, but not for a dissolution of the marriage contract. For "*sevitia*" a divorce *a mensa et thoro* could be obtained, but not a divorce *a vinculo matrimonii*. Many of the states of the union have adopted the canon law in this respect, while the legislatures of others have declared cruelty a sufficient reason for absolutely dissolving the marital relation. But whether a mere separation of the parties or a complete severance of their relations be decreed for the cruel conduct of one of the parties, no distinction is made in regard to the character or nature of the cruelty. What is cruelty, is difficult to state comprehensively; some courts are far more lenient than others, but the reason of the difference is not in the fact that in the one court a divorce *a vinculo* is sought, whereas in another a divorce *a mensa* only is asked, but rather lies in the varying views the courts take of the marital relation and of its place in the social polity.

Mr. Bishop, 1 Mar. and Div. 717, 6th ed., makes an effort to give such a definition of cruelty as may be followed in all cases coming before the courts. He says it "is such conduct in one of the married parties as, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom." The older cases, and in fact some of the quite recent ones, have maintained that there must have been "actual violence, attended with danger to life, health, or limb, or conduct that must have created reasonable apprehension of such violence." *Hughes v. Hughes*, 44 Ala. 698; *Close v. Close*, 24 N. J. Eq. (10 C. E. Green), 338; *Evans v. Evans*, 1 Hag. Con. 35. But the actual use or the apprehension of violence is not now considered necessary; or perhaps it would more faithfully represent the position of some of our conservative courts to say, that although violence be pronounced essential, yet acts are now placed under the head of violence which were not so regarded by the earlier judges. The reason for granting a divorce for this cause at all is in the fact that courts of law will not compel a person to live with one from whom injury is to be feared. It is not so much to punish an offense already committed as to relieve the complaining party from apprehended danger: *Morris v. Morris*, 14 Cal. 76; *English v. English*, 27 N. J. Eq. (13 C. E. Green), 579; *Kenley v. Kenley*, 2 How. (Miss.) 751; *Turbitt v. Turbitt*, 21 Ill. 743; *Caruthers v. Caruthers*, 13 Iowa, 286. And, therefore, if it appear that the plaintiff does not apprehend any

personal danger, or that the conduct of which complaint is made does not so disturb or alarm the complainant as to render impossible the faithful performance of the marital duties, the reason for separating the parties fails: Same citations. As is said in *English v. English*, *supra*, "the court must find that the wife (the libellant) is in bodily danger if she go back to him; that he has done and will continue to do such acts as will endanger her health, or render life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife." The wife in this case complained that her health was very much injured by the demands of her husband. It appeared that in an operation in aid of childbirth she had been lacerated by the instruments used, rendering excessive intercourse thereafter dangerous to her, as testified by doctors. But it being proved that the husband was in all respects most kind, and offered to discontinue his demands upon her, the court thought that the wife could return to him safely, and denied her petition. Here it is proper to remark that the party is not to be compelled to wait until the injury is actually done: reasonable apprehension that injury will be inflicted is all that can be asked; and the reasonableness is to be ascertained from the temper, habits, disposition, and acts of the parties.

MOTIVE IMMATERIAL.—Lord Stowell, in *Holden v. Holden*, 1 Hag. Con. 458, first adverting to what constituted cruelty, said: "It is not necessary, in determining this point, to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection, and are indeed often consistent with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated." In other words, the safety of the wife is the point under consideration, not the motive of the husband in occasioning her harm. So consonant to reason and justice is this conclusion of the English jurist, that it has been adopted as a part of the law of divorce without dissent. In fact, it is not uncommon to find the identical language used to express the views of later judges.

THE NATURE OF THE ACT is the material inquiry in determining whether cruelty has been used by one of the parties to the other. And it was early adjudged, and has been universally maintained to the present day, except in jurisdictions whose legislatures have otherwise ordained, that the injury complained of must be harmful to the body, mental suffering alone not being sufficient. "Injury, or reasonable apprehension thereof, to life, health, or limb," has been the time-honored formula employed in defining cruelty. It clearly indicates that there must be bodily harm. In *Evans v. Evans*, 1 Hag. Con. 35, this requirement is laid down, and the decisions generally demand it: *Hughes v. Hughes*, 44 Ala. 698; *King v. King*, 28 Id. 315; *Harman v. Harman*, 16 Ill. 85; *Vignos v. Vignos*, 15 Id. 186; *Henderson v. Henderson*, 88 Id. 248; *Odom v. Odom*, 36 Ga. 286; *Close v. Close*, 24 N. J. Eq. 336; *Taylor v. Taylor*, 76 N. C. 433; *Bailey v. Bailey*, 97 Mass. 373; *Cowles v. Cowles*, 112 Id. 298; *Kennedy v. Kennedy*, 73 N. Y. 369; *Latham v. Latham*, 30 Gratt. 307; *Morris v. Morris*, 14 Cal. 76; *Powelson v. Powelson*, 22 Id. 358. But although the harm occasioned must be bodily in its nature, that is, the act complained of must result in injury to life, limb, or health, yet it is not demanded, and in reason could not be, that the injury should be inflicted in any particular way. The injury, and not the manner in which it is brought about, is the point to be considered. This common-sense

principle was not fully observed in the earlier decisions, but is asserting itself in recent adjudications. If damage to the health, for example, is the criterion by which to determine whether or not a divorce should be granted, certainly the means of accomplishing this damage is immaterial. Therefore it is the growing opinion that whatever produces this bodily harm, whether physical violence, or abuse occasioning mental suffering to an extent that breaks down the health, will be cruelty authorizing a divorce. This distinction between physical and mental injury will be more fully considered hereafter in connection with the citation of authorities. It was here desired simply to call attention to the fact that, while physical violence causing bodily harm is undoubtedly good ground for a divorce, it is not physical violence only that must be resorted to before such harm has been done as will warrant a divorce.

Instances of actual violence are numerous, and in considering the probability of a recurrence of such treatment in any given case, the character and habits of the parties are to be viewed. Thus, where a man has kicked his wife, has chased her with a chair, and has on different occasions manifested a dangerous temper while intoxicated, it appearing that he was in the habit of getting under the influence of liquor, the court considered that actual violence and reasonable apprehension of similar acts in the future were established: *Hughes v. Hughes*, 19 Ala. 307. The same principle is applied to a husband who has an ungovernable temper, and who has in moments of rage done violence to his wife: *King v. King*, 28 Id. 315; but not where the party was insane when the act was done: *Werts v. Werts*, 43 Iowa, 534. In *Coursey v. Coursey*, 60 Ill. 186, the court thought it proper to consider the intemperance of the husband in determining the danger of the wife from his threats and acts of violence. So where a man has whipped his wife, and threatens to do so again: *Taylor v. Taylor*, 76 N. C. 433. But so far as the threats are to be weighed in concluding whether or not a divorce should be granted, it is important to consider the probability of the menaces being carried into execution. Mere meaningless outbursts, which give rise to no fear that any danger is to be apprehended, would not justify a judicial separation of the parties; while on the other hand no court ought to wait for the threatened act to be committed: 1 Bish. on Mar. and Div. 729; *Evans v. Evans*, 1 Hag. Con. 35; *Jones v. Jones*, 66 Pa. St. 494; *Kennedy v. Kennedy*, 73 N. Y. 369; *Beebe v. Beebe*, 10 Iowa, 133; *Vignos v. Vignos*, 15 Ill. 156. The use of coarse epithets to one's wife: *Freeman v. Freeman*, 31 Wis. 235; or of violent and abusive language: *Day v. Day*, 56 N. H. 316; *Farnham v. Farnham*, 73 Ill. 497; accompanied in each case by acts of violence, make the statutory cause of divorce complete. A single act of violence may not amount to legal cruelty: *Hosshall v. Hosshall*, 31 Md. 72; S. C., 34 Am. Rep. 298; *Finley v. Finley*, 9 Dana, 52; but all the circumstances are here also to be considered: *Lauber v. Mast*, 15 La. Ann. 593; and "if one act should be of that description which would induce the court to think it is likely to occur again with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference:" *Holden v. Holden*, 1 Hag. Con. 453. It certainly would require no authority to warrant the pronouncing the following treatment of one's wife cruel: striking her, spitting in her face several times, and calling her a "dirty slut," and the like: *Thomas v. Thomas*, 20 N. J. Eq. (5 C. E. Green), 97; striking her, tearing out her hair, and chasing her with a gun, declaring he would blow her brains out: *Tayman v. Tayman*, 2 Md. Ch. 393; tearing her hair, choking her, and striking her: *Turner v. Turner*, 44 Ala. 437; assaulting her, slapping her face, hitting her with a whip, tearing out

her hair, and throwing her down and striking her head on the floor: *Barrere v. Barrere*, 4 Johns. Ch. 187. But a husband's kicking his wife while in bed, because she put her cold feet against him, is not cruelty, and will be especially disregarded where the deed was done ten years before the libel was filed: *Henderson v. Henderson*, 88 Ill. 248. Neither will the groundless prosecution of the husband by the wife for an alleged crime of assault and battery resulting in his acquittal be held "cruel and inhuman treatment:" *Small v. Small*, 57 Ind. 568; nor the utter denial of sexual intercourse by the wife: *Cowles v. Cowles*, 112 Mass. 298; nor the carelessness of the wife about her household affairs, leaving her house and remaining away some time: *Bennett v. Bennett*, 24 Mich. 482. But it would very clearly be cruelty for a man to starve his wife, or to refuse to supply her with the necessities of life, he having them within his power: *Smedley v. Smedley*, 30 Ala. 714. No actual violence is necessary in such a case as this; and it very strikingly illustrates the truth of the assertion in *Cowles v. Cowles*, 112 Mass. 298, that "there may be personal violence which does not amount to cruelty, and there may be cruelty without personal violence." This brings us to the point to which we heretofore adverted, that physical violence was not necessary to the accomplishing of bodily harm—cruelty—within the meaning of the divorce statutes.

MENTAL SUFFERING.—Lord Stowell, in *Evans v. Evans*, 1 Hag. Con. 35, made use of language often quoted in this connection, that legal cruelty is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attentions, occasional sallies of passion, denials of little indulgencies, and particular accommodations which do not threaten bodily harm. So *Harman v. Harman*, 16 Ill. 85. But, on the other hand, a course of contemptuous conduct, or the heaping of insults upon one, or the continuous use of a moral force, may, by operating upon the nervous system through the mind, so break down the health and prostrate the body as to make the bodily harm complete. The courts are recognizing this fact. One of the most exasperating instances of cruelty to a wife occurs in the English reports: *Kelly v. Kelly*, 2 L. R. (Pro. & Div.) 31. The husband, a minister, took upon himself the spiritual welfare of his wife. He endeavored to bring her to a sense of her sinfulness—that is, the sinfulness of the flesh in general, there being no evidence of anything but the most upright and affectionate demeanor on her part—by debarring her from the society of her friends, refusing to permit her to go out unless accompanied by one of his servants, taking from her the care and charge of the household and giving it to a domestic, never speaking to her except in harsh and unrelenting tones, and always of the evil of her ways and of her stubbornness in not perceiving her errors. The reverend tyrant maintained that he had a perfect right to do this, as he used no physical force, and that the fact that the wife's health entirely gave way and her life became endangered by his treatment had nothing to do with the case. But the court could not listen to such a plea; it very properly replied that "a wife is not a domestic slave, to be driven, at all cost short of personal violence, into compliance with her husband's demands. * * * If force, whether physical or moral, is systematically exerted for the purpose, in such a manner, to such a degree, and during such length of time as to break down her health and render serious malady imminent, the interference of the law can not be justly withheld by any court which affects to have charge of the wife's personal safety." The California supreme court, in *Powelson v. Powelson*, 22 Cal. 358, adopted the view "that any conduct sufficiently aggravated to produce ill health or bodily pain, though operating primarily upon the mind only, should be regarded as cruelty." The same doctrine is asserted in

Latham v. Latham, 30 Gratt. 307; *Cole v. Cole*, 23 Iowa, 433; *Beebe v. Beebe*, 10 Id. 133; *Wright v. Wright*, 6 Tex. 3; *English v. English*, 27 N. J. Eq. 579; *Black v. Black*, 30 Id. 215; *Boyce v. Boyce*, 23 Id. 337; *Mayhugh v. Mayhugh*, 7 B. Mon. 424. "There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as positive violence, and which therefore would afford grounds for relief by the court:" *Latham v. Latham*, 30 Gratt. 307. And this outrage inflicted upon the feelings may be accomplished by injuries to third persons, so that it is inconsistent with the marital relations, duties, obligations, and affections: *Wright v. Wright*, 6 Tex. 3. As an example of recognized legal cruelty, though unaccompanied by physical violence, and operating primarily upon the mental state, is the malicious and unfounded charge against the wife of adultery: *Pinkard v. Pinkard*, 14 Id. 356, where it is called "undoubtedly an act of gross cruelty." And so in *Kennedy v. Kennedy*, 73 N. Y. 369, in counsel's argument wherein are citations upon this proposition. Not only are such accusations "cruel," but it is "extreme cruelty" for a husband openly to consort with and express his preference for loose females: *McClung v. McClung*, 40 Mich. 493. "It would be hard," says the court in this case, "to conceive of any worse cruelty to a wife who had any sensibility left, than such a course of conduct. No assault or bodily injury could make it worse."

It is true that some courts are not yet inclined to recognize the cruelty of actions which, though productive of injury to the health, are unaccompanied by violence: *Goodrich v. Goodrich*, 44 Ala. 670. There the court go so far as to say that acts of extreme vulgarity and rudeness alone would not justify a divorce in favor of the wife, though they might wholly undermine her peace of mind and health. This may be excellent conservatism, but it is poor justice and poor policy. It is opposed to the weight of modern authority, and to the popular sense of what is right, as manifested in the enactments of some of the state legislatures. "Extreme cruelty," says the California civil code, sec. 94, "is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." A great difficulty, no doubt, may be met with in determining the effect of a course of conduct which operates upon the feelings primarily. The very injury which a divorce seeks to avert may, perhaps, be necessarily produced before the courts can be convinced that there is danger of a loss of health from the insidious treatment of one of the married parties. But the courts find some aid in looking to the character, habits, disposition, and physical condition of the parties. Acts which might seriously affect a delicate, sensitive, and refined person would, perhaps, have no effect at all upon one robust, coarse, and of little or no sensibility. The surroundings of each particular case must be studiously viewed, and if the conclusion is forced upon the court that future living together as husband and wife will be accompanied with injury to either, not merely that they may be unhappy, *Vignos v. Vignos*, 15 Ill. 156, a decree of separation ought to be granted. As evidence of the likelihood of the repetition of the acts or conduct complained of and their probable effect, not only the acts and conduct must be taken into account, but also the nature and disposition of the parties, so far as is possible. The difference between man and woman in regard to delicacy of organization and to physical strength, is plainly recognized in those statutes of early date and preserved unto recent times, which giving a divorce to the wife for her husband's cruelty, refuse it to the husband: *Van Veghten v. Van Veghten*, 4 Johns. Ch. 501; *Gordon v. Gordon*, 48 Pa. St. 226; *Bennett v. Bennett*, 24 Mich. 482; *Hughes v. Hughes*, 44 Ala. 698.

IN SOME STATES STATUTORY ENACTMENTS declare it to be a cause for divorce that either party "shall offer such indignities to the other as shall render his or her condition intolerable:" *Hooper v. Hooper*, 19 Mo. 355; *May v. May*, 62 Pa. St. 206; *Jones v. Jones*, 66 Id. 494, where, by the way, the wife only can get a divorce for this reason; *Rose v. Rose*, 9 Ark. 507; *Payne v. Payne*, 4 Humph. 500; *Sheffield v. Sheffield*, 3 Tex. 79; *Taylor v. Taylor*, 18 Id. 574. But even under such a provision, a husband can not be relieved of his wife, because she gads about a little, is sulky at times, and he has been put to "the direful necessity of mending his own coat once in his life:" *Sheffield v. Sheffield*, 3 Tex. 79. The language of the different legislative acts ought to be considered when the decisions thereunder are cited as authority in any other jurisdiction; for although, in some instances, the verbal differences are immaterial as between "cruelty" and "cruelty of treatment," *Coles v. Coles*, 2 Md. Ch. 341, yet a decision may be rendered under a "cruel and abusive treatment" provision of a statute which would not extend the same relief, had the action been taken under another clause against "extreme cruelty:" *Cowles v. Cowles*, 112 Mass. 298. Again, under a statute requiring "extreme and repeated" cruelty, it is evident that a divorce could not be granted for a single act which in another state, not using the word "repeated," would be sufficient to warrant such a decree: *Embree v. Embree*, 53 Ill. 394.

PROVOCATION.—There is another element entering into the determination of the rights of the parties to an action for divorce. It is that the party complaining must be without fault: *Hughes v. Hughes*, 44 Ala. 698; *Soper v. Soper*, 29 Mich. 305; *Knight v. Knight*, 31 Iowa, 451; *Waring v. Waring*, 2 Phillim. 132. A reformation of the complainant's conduct and deportment must be first had; the ill-treatment must not be provoked: See the note to *Pierce v. Pierce*, 15 Am. Dec. 210.

ALBIN v. PRESBY.

[8 NEW HAMPSHIRE, 406.]

FOR GOODS IN AN INNKEEPER'S CUSTODY, he is responsible in case of loss, except when occasioned by the servants or companions of the guest.

A SHED IN AN OPEN YARD, under which the plaintiff's wagon is placed for the night, with his consent, is not a part of the inn so as to charge the innkeeper for loss.

CASE to recover the value of merchandise taken from plaintiff's wagon. It appeared that the plaintiff came to the defendant's inn with the wagon and several horses, and was entertained over night; that on first arriving at the inn, the wagon was left in the defendant's yard, which was open to the highway, but was soon afterwards drawn under the shed by the defendant, who remarked at the time that it looked like rain. The wagons of guests were placed under this shed when taken under shelter at all. There was no proof of negligence on the part of the defendant. Verdict for the plaintiff, subject to the opinion of the court.

O. G. Atherton, for the defendant.

A. F. and G. Y. Sawyer and Farley, for the plaintiff.

PARKER, J. The general principle, that an innkeeper is bound to keep safely the goods of his guest, which are in his custody, *infra hospitium*, but that he shall answer for nothing without the inn, is well settled: *Cayle's case*, 8 Co. 32 (Dub. ed.) There are exceptions, where the loss is occasioned by the servants or companions of the guest, not necessary to be farther noticed at this time. When goods shall be said to be in the custody of the innkeeper, within the inn, is sometimes a question of difficult solution: *Sanders v. Spencer*, 3 Dyer, 266 b; *Farnsworth v. Packwood*, 1 Stark. 249; *Burgess v. Clements*, 4 Mau. & Sel. 306; *Richmond v. Smith*, 8 Barn. & Cress. 9. The limits of the *hospitium*, or inn, have not been defined with precision, and must depend somewhat upon the particular circumstances of each case. In *Cayle's case*, "it was resolved, that if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it." But it is said to have been held, "if the owner doth not require it, but the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen:" *Id.* In that case there is a reference to a case in the year books, where Knivet, C. J., said, "that the innholder is bound to answer for himself and for his family, of the chambers and stables, for they are *infra hospitium*." And it was said that "the horse which at the request of the owner is put to pasture, is not *infra hospitium*." Whether he is to be regarded as "within the inn," when placed in the pasture by the innholder without directions, or whether, it being the duty of the innholder in such case to place the horse in the stable, he is to be held liable as if he had done so, is not stated.

It is not necessary that the goods should be within the walls of the house, or of the stables, in order to be "within the inn." "Where a sleigh loaded with wheat was put by the guest into an outhouse, appurtenant to the inn, where loads of that description were usually received, and the grain was stolen during the night, the innkeeper was held liable for the loss." The court said, "the sleigh with its contents was put into an outhouse, appurtenant to the inn, where it had been usual for the defendant to receive loads of that description. The doors of the wagon-house were broken open, from which it may be in-

ferred that the building was close, and the doors fastened in such a manner as to promise security. The bags of grain therefore may be deemed to have been *infra hospitium*." *Clute v. Wiggins*, 14 Johns. 175 [7 Am. Dec. 448]. Judge Story, referring to this case, says: "Where goods are delivered at the usual place for such goods, the innkeeper is chargeable with them, although not strictly within the inn." Story on Bail. 314. But the case shows that they were regarded as *infra hospitium*. Some stress seems to have been laid on the fact that the goods were placed in a building appurtenant to the inn. In England, however, the doctrine has been carried farther. "An innkeeper on a fair-day being asked by a traveler, then driving a gig of which he was the owner, whether he had room for the horse, put the horse into the stable of the inn, received the traveler, with some goods, into the inn, and placed the gig in the open street, without the inn-yard, where he was accustomed to place the carriages of his guests on fair-days. The gig having been stolen from thence, held that the innkeeper was answerable." *Jones v. Tyler*, 1 Adol. & El. 522. The case was considered by the judges as "very near the distinguishing line"—"on the extreme limit." But it did not appear that the gig was so placed with the consent, or even with the knowledge of the plaintiff, and this circumstance is adverted to by the court. Mr. Justice Littledale said: "On the plaintiff's inquiring whether there was room, the defendant finds room for the horse; it is not likely that the parties understood that the gig was to be at the mercy of any one who came by. The place where it is put is the place commonly used for the purpose, on fair-days, by the defendant; it must, therefore, as against the defendant, in this case, be taken to be part of the inn." And Mr. Justice Taunton said: "It does not appear that the gig was put in this place at all at the request or instance of the plaintiff; the place is, therefore, part of the inn; for the defendant, by his conduct, treats it as such. If he wished to protect himself he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it."

Chancellor Kent, in stating the doctrine in *Cayle's case*, that if the owner had not directed that the horse be put to pasture, and the innkeeper had done it of his own accord, he would be responsible, says: "Perhaps this rule might admit of some limitations: for if the putting the traveler's horse to pasture in the summer season be the usual custom, as it is in many parts

of the country, the consent or direction of the owner to that effect would be fairly presumed." 2 Kent Com. (1st ed.) 458. And Judge Story, referring to this passage, remarks that "the common usage of the country must have great weight in all such cases. In the country towns in America, it is very common to leave chaises and carriages under open sheds all night at inns; and also to leave the stable doors open or unlocked. Under such circumstances, if a horse or chaise should be stolen, it would deserve consideration how far the innkeeper would be liable, as the traveler might be presumed to consent to the ordinary custom:" Story on Bail. 312. The present case finds, to be sure, that the wagon was put in the place where the loaded wagons of guests were usually placed, when they were put under shelter; but they were doubtless usually so placed with the knowledge and assent of the guests. It is well known that loaded wagons are often left within the limits of the highway near the inn, and are usually not placed in any building or inclosed yard, unless there is a special request for it. Few inns in the country have suitable accommodations for securing property of this character in such a manner.

In the present case there is not only knowledge and assent, but the plaintiff himself places the wagon in that situation. He of course could not have expected that it would be removed to another place; he made no request to that effect; and he must have known that the goods could not be secured from thieves in that place, except by a watch. Assuredly he could not have expected they would be guarded by the defendant, in that manner; and, under such circumstances, ought not to have expected that the defendant was to be responsible for a loss. And as the inns in this country are not generally furnished with accommodations for the protection of the carriages of all guests who may lodge at the inn, and the custom of permitting them to remain in open yards, where they can not be protected, but by a guard, is so universal, and well known, we think it a sound position that the assent of the traveler is to be presumed in such case, unless he makes a special request that his carriage should be put in a safe place; and that such open yard is not to be deemed a part of the inn, so as to charge the innkeeper for the loss, unless he neglects, upon request, to put the goods in a place of safety, which he is bound to do, on such request, if he have any accommodations which enable him to comply with it.

Plaintiff nonsuit.

THE LIABILITY OF INNKEEPERS is considered at length in the note to *Glute v. Wiggins*, 7 Am. Dec. 449. Various decisions upon the principle involved in this general subject are found in this series: *Newson v. Axon*, 10 Id. 685, where the innkeeper was held liable for the loss of a guest's horse stolen from the stable: *Towson v. Havre de Grace Bank*, 14 Id. 256, involving the consideration of the question who is a guest. In the note thereto the Maryland doctrine, that such amount of money in a guest's trunk only will be recoverable from the innkeeper as would be convenient to meet the particular guest's traveling expenses, is considered. In *Mason v. Thompson*, 20 Id. 471, an innkeeper, who was also a livery-stable keeper, was decided to have received a horse of a guest as innkeeper, not as stableman, there being no notice that the animal was taken in the latter capacity. The liability of an innkeeper is likened in *Hallenbake v. Fish*, 24 Id. 88, to that of a common carrier, in that trover would not lie where the goods were lost by theft.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

MERCEREAU v. BERGEN.

[3 GREEN'S LAW, 244.]

EVIDENCE, THE OBJECT OF WHICH IS TO SET UP TITLE to the freehold adverse to the plaintiff, is not admissible in an action of forcible entry and detainer.

CERTIORARI to remove into this court the judgment and proceedings in a case of forcible entry and detainer. The opinion states the case.

Nevius, for the plaintiff.

Lupp, for the defendant.

HORNBLOWER, C. J. On the trial of this cause before the justice, a verdict and judgment were rendered for the defendant. The plaintiff below, is therefore plaintiff in certiorari. It appears by the state of the case agreed upon by the parties, that the defendant offered a witness to prove that one Mrs. Bowne, had an estate in dower in the premises in question; that the witness was employed by a person named Oakley (under whom the defendant, Bergen, claimed and entered), to purchase of Mrs. Bowne, her right of dower, for him; that the witness did make the purchase for Oakley, for four hundred dollars; and that Mrs. Bowne was to give him possession on the second of April, 1833. This evidence was objected to by the plaintiff, but the justice overruled the objection and admitted the evidence. In doing so, the justice clearly committed an error. The twentieth section of the act, Rev. Laws, 352, expressly enacts, "that the estate or merits of the title, shall in no wise be inquired into," on any complaint under that act. What was

the object of this evidence but to set up a title to the freehold, against the complainant? It was to show that Bergen, the defendant, had a right to the possession, because Oakley, under whom he entered, had a title to the freehold, by a purchase from Mrs. Bowne. This is the very thing prohibited by the statute.

The evidence of Rosenbom, another witness on the part of the defendant, also objected to by the plaintiff, but admitted by the justice, I think was equally inadmissible. He testified in substance that the plaintiff told him in May, 1831, that he had sold the farm to one Bennett (under whom, Oakley now claims to be owner in fee); and that the premises in question were part of, or included in the farm sold by him to Bennett. This might have been competent evidence in an action of ejectment between the parties; but was not admissible on the trial of this cause. For these reasons I think the verdict and judgment must be set aside.

On the argument of this cause, the counsel for the defendant insisted at large, that this court must look into the errors on the other side; and contended, that the plaintiff was not in a condition, in respect of the premises in question, to maintain a forcible entry and detainer, against anybody; and even if he was, that there was no evidence in the court below, of a forcible entry having been committed; or if any, not sufficient to carry the cause to the jury. On these grounds, the defendant moved to nonsuit the plaintiff below, but the motion was overruled by the justice, and the cause submitted to the jury. Whether the justice was right in doing so, is a matter which the defendant can not draw into discussion here. If the verdict had been against the defendant, he might have brought that decision into review before this court, on certiorari. But the judgment was in his favor, and the decision of the justice, whether right or wrong, did the defendant no injury. He can not therefore now complain of it. This certiorari is in the nature of a writ of error; upon which, we are to examine the errors assigned by the plaintiff in error. We must either affirm or reverse the judgment below. Shall we affirm a judgment which may have been induced by illegal evidence? If we do, we put the plaintiff in a worse condition than he would have been, if the justice had granted the nonsuit. We conclude him, on the merits of his case. Such a judgment, if rendered by us, must proceed upon the ground, that the justice committed more errors in favor of the plaintiff than he did against him. We must strike a balance in the account of errors, and give judgment in favor of the party, against whom most have

been committed. Our language to the plaintiff in error, in such case, would be, that upon the whole, you are not entitled to recover, and though the judgment against you is founded in error, we must affirm it. Besides, such a course of adjudication would involve us in a trial *de novo*, upon every certiorari; and then we ought to call upon the defendant to assign errors, as well as the plaintiff. This can not be. If the court below has made an erroneous decision against the party plaintiff in error, we must reverse the judgment, and restore him to what he has lost by it.

If I am right in this view of the subject, it is unnecessary to examine the points raised by the defendant's counsel, at the same time. As the suit may be renewed between the parties, and the same questions be again raised, it may be well to express an opinion upon those matters.

It is undoubtedly true, that an action for a forcible entry and detainer, can not be brought by the landlord; it can only be maintained by the tenant in possession: *Bennett v. Montgomery*, 3 Halst. 48; *Mairs v. Sparks*, 2 South. 513. But in the case under consideration, if the witness was to be believed, the lessee had actually surrendered and given up the possession of the leasehold premises to the plaintiff, his former landlord. At any rate, under the circumstances of this case, it was a question of fact for the jury, and the justice very properly submitted it to them. Then as to the question of force, there was some evidence that the plaintiff had fastened up the house—that the defendant came there in company with eight or ten persons—that after Mr. Lupp, the agent for Oakley, had demanded possession of the plaintiff, and been refused, he said “he hoped there would be no difficulty, but he was bound to inform the defendant he must take possession;” thus pretty strongly implying, that if possession could not be obtained without difficulty, it must be taken by force. Threats need not be in boisterous terms—those most to be dreaded, are sometimes conveyed in the mildest tones and with the gentlest expressions. It was further in evidence, that the defendant did then enter and remove the furniture. If the jury believed this evidence, it was in my opinion sufficient to establish the fact of a forcible entry. The language of the act is, Rev. Laws, 849, that if the party shall enter or take possession, “by such words, circumstances, or actions, as have a natural tendency to excite fear or apprehension of danger; or by putting out of doors, etc., the goods of the party in possession,” he shall be guilty of a forcible entry, etc.

Now, here was an actual entry by the defendant, preceded by plain intimation, "peaceably if we can, and forcibly if we must;" and backed by an array of eight or ten men, ready to assist if necessary—and in my opinion the "natural tendency" of such "actions, words, and circumstances," was to excite "fear or apprehension of danger," in case resistance had been offered. This brings the case clearly within the principles adopted by this court, in *Butts v. Voorhees*, 1 Green, 13, and the cases there cited by the late Chief Justice Ewing. On both these points, then, I am of opinion, the justice was right; but the judgment must be reversed, for the reasons I have before assigned.

FORD and RYERSON, JJ., concurred.

Judgment reversed.

TITLE CAN NOT BE INQUIRED INTO IN ACTION OF FORCIBLE ENTRY: See note to *Evill v. Concell*, 18 Am. Dec. 147.

DEFENDANT'S TITLE IS NOT ADMISSIBLE IN EVIDENCE under an indictment for forcible entry and detainer: *State v. Bennett*, 18 Am. Dec. 663.

WHITE v. TRUMBULL.

[3 GREEN'S LAW, 314.]

APPLICATION OF PAYMENTS.—The debtor may direct to what debt his payment shall be applied, but if he waives the right to do so, the creditor may make the application, and if both are silent the law must decide.

LAW WILL MAKE A PRO RATA APPLICATION in a case where the debtor was equally bound to pay both debts, and where his acts showed a substantial blending of the claims, and there was a virtual appropriation by both parties to the claims so blended, at the time the payments were made.

ASSUMPSIT. The opinion states the case.

Williamson, for the defendant.

Pennington, for the plaintiff.

By Court, RYERSON, J. This was an action on a bill of exchange, for two hundred and forty dollars, drawn by one William T. Williams, on the defendant, and accepted by him, dated thirteenth January, 1827, payable in six months, and discounted for Williams at the Windham county bank. The plaintiff was and is the cashier of the bank; and the action was brought for its benefit, White being only nominally the plaintiff. The said Williams was fixed as indorser. In November, 1827, Williams drew a note for six hundred dollars, in favor of

Joseph G. W. Trumbull, payable in sixty days, at the same bank, and there discounted for Williams. This note was also protested in January, 1828. These securities were both treated by the bank and Williams as his own proper liabilities, and the other parties thereto, as parties who had become such for his accommodation. In March, 1828, Williams paid one hundred dollars to the bank, which was deducted from the aggregate amount of the note and bill. The cashier of the bank had before, in February, applied by letter to Williams for the adjustment of these demands, and for directions about the bill, whether to be sent for collection of the acceptor, to which it does not appear that any answer was given. In April they were placed in the hands of the bank's attorney for collection, accompanied with a statement, embracing both bill and note, summed up together, and the payment of one hundred dollars deducted from the sum total. On the twelfth May, the attorney presented the note and bill, and this statement, to Williams, who undertook to, and did in part provide for them as follows: First, by a draft for five hundred and seventy dollars, on Joseph Trumbull, payable at sight, which was promptly paid. Secondly, by a new note, to be indorsed by J. G. W. Trumbull, and discounted at the bank, for two hundred and ten dollars, the amount of the balance of debt, interest, discount, and expenses. In ascertaining this balance, no distinction was made between the two liabilities, or the expenses incurred thereon. At the close of this arrangement, Williams drew up and the attorney signed a paper acknowledging the receipt of the draft on Joseph Trumbull for five hundred and seventy dollars, and the note of two hundred and ten dollars, expressing, that when the draft was paid, and the note of two hundred and ten dollars, indorsed by J. G. W. Trumbull, it would be in full of the note of six hundred dollars, and the bill of two hundred and forty dollars. At the foot of this receipt Williams made a statement as follows:

Note.....	\$600 to W. C. Bank.
Draft on Joseph Trumbull.....	240
	840
Paid	100
	740
Interest on note and order, etc.	40
	\$780

It was also proved that when the note was indorsed and delivered at the bank, the old note and bill were to be delivered up. This note of two hundred and ten dollars never was indorsed and returned to the bank, or its attorney. Thus leaving that balance to be collected on the original note, or bill, or both of them ratably. The defendant insisted that the payments which had been made, ought to be applied in the first place to satisfy the bill of two hundred and forty dollars, which was the oldest debt.

For the plaintiff it was insisted, that they had a right to appropriate to either, at their election, which election they had made in the first place by a specific application on the books of the bank to the satisfaction of the six-hundred-dollar note (which was done as appeared by the books, about two years after the above negotiation). And secondly, by bringing this action on the bill, to recover the balance.

The judge charged the jury, that the payments which had been made, ought to be applied *pro rata*, to each demand. Under this charge the jury found a verdict for the plaintiff, for one hundred and seventy-seven dollars and ninety cents, which it was agreed should be modified if necessary, according to the opinion of this court. If the court should be of opinion, that the payments ought to be first applied to the bill, the verdict and judgment should be entered for the defendant. But if the court should be of opinion that the payments were rightly applied to the note of six hundred dollars, a verdict and judgment to be rendered for plaintiff, for the amount of the two hundred and ten dollars, with interest after the expiration of the sixty days.

The application of payments seems to be a subject, about which it is difficult to find general principles in the books, to guide our practice. The party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of its appropriation. If both are silent, the law must decide. But what is the decision of the law, or of enlightened reason, seems not to be well settled. Sometimes the court seems to have gone on the principle of preferring the supposed wishes or interest of the party paying. And sometimes a similar preference has been given to the party receiving. At other times the interest of a third party has governed the decision. And the cases seem to rest more on their own particular facts than upon any general principles. In the written argument submitted to the court, it is contended,

that the older debt should be first paid, and cited Peak. N. P. 64;¹ 3 Stark. Ev. 1091, and notes. But that has not always been allowed, as may be seen by consulting the book last cited; and the cases there collected.

I would remark, that both these claims were really the debt of Williams, for money loaned to him, and which were actually due, for the payment of which, he was to provide, and to both of which indiscriminately, the payments made by him, were applied by the bank, with his knowledge, and without his objection. These facts, it would seem, ought to conclude both him and the bank, and hold them to a *pro rata* application of the money. It was supposed on the argument, that W. T. Williams meant to provide for the entire exoneration of J. M. Trumbull. But this does not appear. He meant to pay the whole debt, as one debt; as such he treated it, and such it was in fact to him, although consisting of items taken up at different times. He made no stipulation, or proposition even, to exonerate J. M. Trumbull, on a partial payment, to the amount or greater than that for which he was liable. And he insisted before the court and jury (having been examined as a witness in the cause), that it was all paid, though that fact was found against him by the jury. It shows therefore a substantial blending of the claims, and an appropriation, at the time of the payments, by the acts, if not by the language of both the parties, which neither alone could afterwards change: *Taylor v. Sandiford*, 7 Wheat. 20.

But if it were true, that there had been at the time, no appropriation by either party, how would the law appropriate it? It would seem to be an equitable rule, to let the payments operate ratably for the exoneration of all the sureties; for there is nothing in the case to show that Williams, or the bank, could have any interest in discharging either liability, in preference to the other. The equities of third persons have sometimes had their influence in settling such questions; even extending to the direction of *pro rata* application of payments: See the cases referred to in 3 Stark. 1092, note 2. Nor can I yield to the plaintiff's pretensions in this case. The debtor must direct the application, when the payment is made. The creditor is not held so strictly to time; but what he asks, an interval of two years, or until the bringing of the action, would be an unreasonable indulgence. I am therefore of opinion the

1. *Dane v. Holdsworth*.

verdict is right, and that the plaintiff should have judgment thereon.

FORD, J., concurred.

The chief justice gave no opinion, as he had been counsel in the cause, before his appointment.

Judgment for plaintiff.

Cited and distinguished in *Oliver v. Phelps*, Spencer, 197; cited in *Haynes v. Waite*, 14 Cal. 449, to the point that a creditor who has once made an application of a payment can not afterwards change it.

APPLICATION OF PAYMENTS: See *Vicary v. Moore*, 27 Am. Dec. 323; *Burke v. Albert*, 20 Id. 209; *Baker v. Stackpole*, 18 Id. 506, note 515; *Harker v. Conrad*, 14 Id. 691, note 694.

RECEIVERS OF THE BANK OF NEW BRUNSWICK v. NEILSON.

[3 GREEN'S LAW, 387.]

DECLARATION IN TROVER FOR CONVERSION OF PROMISSORY NOTES need not state their dates or time of payment.

COUNT IN SUCH DECLARATION, WHICH DESCRIBES THE NOTES as "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the said promissory notes in the first count mentioned," is bad on special demurrer, because it mixes them all together, without distinguishing the drawer and indorser of one note from another.

REFERENCE MAY BE MADE TO PRIOR COUNT to avoid great prolixity.

TROVER. The opinion states the case.

Nevius, for the plaintiffs.

Hardenbergh, for the defendant.

FORD, J. The defendant has demurred specially to the first two counts in a declaration in trover for the conversion of eleven promissory notes, and seven bills of exchange, because neither the date nor time of payment in any of the notes or bills is stated, but only the name of the maker, payee, and indorser, of each note, and of the drawer, drawee, payee, and indorser, of each bill. If the exact sum, date, and time of payment, in lost instruments, were to be required in actions of trover, such actions would be banished from courts of law, into equity for discovery and relief. Hence it is laid down in *Bac. Abr.*, Trover, F; *Bull.* 37, and in all cases upon the subject, that these particulars are not to be required of plaintiffs, because

they are not in possession of the instruments, and any misrecital would be fatal to their actions. Therefore the plaintiffs must have judgment on the first two counts.

The defendant demurs to the third count specially, because he alleges it does not identify any one of the eleven notes from the rest of them. It says, "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the said promissory notes in the said first count mentioned." Reference is justifiable, no doubt, to a prior count, to avoid great prolixity. Had it called them the same eleven promissory notes in the first count mentioned, it would have been as certain as that count is; but "eleven promissory notes having the like drawers and indorsers," mixes them all together, without distinguishing the drawer and indorser of one note from another. For this reason, on a special demurrer, I am of opinion the judgment on it must be for the defendant.

Judgment for plaintiffs on the first and second counts, and for the defendant on the third count.

DEN v. WESTBROOK AND MYERS.

[3 GREEN'S LAW, 371.]

PREVIOUS DEMAND OF POSSESSION, WHEN NECESSARY IN EJECTMENT.—

Where one of the defendants in an action of ejectment entered under an agreement to purchase, and while in possession leased a part of the premises to the other defendant, the vendor can not oust either of them, without a previous demand of the possession; and service of a declaration in ejectment is not equivalent to such a demand.

EJECTMENT for lands in Sussex county. It appeared from the evidence that Myers senior, the lessor of the plaintiff, had title to the premises in question; that Myers, junior, one of the defendants, entered on the premises under an agreement to purchase, and leased a portion thereof to Westbrook, the other defendant. There was a verdict for the plaintiff, under the direction of the court, reserving the question whether the defendants are entitled to notice to quit.

Anderson and Haines, for the plaintiff.

Halsted and Miller, for the defendants.

By Court, HORNBLOWER, C. J. There was no relation of landlord and tenant subsisting between the lessor of the plaintiff and the defendants, or either of them; not even by construction, so as to entitle them to a notice to quit.

The question presented by the facts in this case, and which was overlooked both by the court and counsel, at the circuit, is not, whether the defendants were entitled to a notice to quit, as in the case of actual or constructive tenancy from year to year, but whether the plaintiff could institute an action of ejectment without previously making a demand of possession.

The defendant Myers entered by the permission of the lessor of the plaintiff, and in pursuance of an agreement made between them for the sale of the premises to Myers. The possession of the latter and his subsequent lease of a part of the lands to Westbrook, the other defendant, was entirely consistent with his right of possession. Under such circumstances, the vendor can not oust the defendants or either of them without a previous demand of the possession. The service of a declaration in ejectment, is not equivalent to such a demand; for such a service proceeds upon the ground that the tenant is a wrong-doer; and if he suffers judgment by default to pass against a casual ejector, he may be sued for the mesne profits: *Right ex dem. Lewis v. Beard*, 13 East, 211; *Doe dem. Newby v. Jackson*, 1 Barn & Cress. 448; *The Law of Land. and Ten. by Comyn*, 291; 2 Law Lib. 163; *Kirtland v. Pounsell*, 2 Taunt. 145. I am therefore of opinion, that the verdict ought to be set aside, and a nonsuit entered.

Plaintiff nonsuit.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY:

SOULL v. REEVES.

[2 GREEN'S CH. 84.]

DEED OF ASSIGNMENT FOR BENEFIT OF CREDITORS, executed and delivered by the assignor, and received by the assignee, with knowledge of its objects and effect, divests the grantor of his estate, although it was not acknowledged by him.

SUCH DEED CREATES A TRUST for, and vests a beneficial interest in, the creditors, though they know nothing of it.

CANCELLATION AND SURRENDER OF SUCH DEED after it has been executed and delivered, and the trust accepted by the trustee, can not destroy the trust, or impair the rights of the *cestuis que trust*.

NO PARTICULAR FORMALITY IS NECESSARY to show the acceptance of a trust, but acts fairly implying a consent are sufficient; and taking possession of the property assigned is an act of that kind.

PERSON NAMED AS ASSIGNEE IN DEED OF ASSIGNMENT may refuse to act as such; for no one can be made a grantee against his will.

INJUNCTION WILL NOT BE DISSOLVED, where fraud is charged in the bill on which it is granted, and the answer of the defendant is not full and satisfactory.

COURT CAN NOT BE SATISFIED WITH A GENERAL OR AN EVASIVE ANSWER, where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put in relation to particular facts.

ESTATE CONVEYED IN TRUST TO TWO PERSONS, one of whom refuses to act as trustee, vests in the other.

BILL for injunction and relief, filed by the complainants on behalf of themselves and such other creditors of Thomas Reeves, as should be entitled to avail themselves of its benefit. On filing the bill an injunction issued, to restrain the sheriff of Salem county, and the judgment creditors of Reeves from seizing or selling any of the trust property covered by the assign-

ment specified in the bill. After the filing of the answers, a motion was made to dissolve the injunction, which motion was heard on the bill and answers. The other facts are stated in the opinion.

Elmer and Jeffers, in support of the motion.

Wall, *contra*.

Vroom, Chancellor. The bill charges that Thomas Reeves, of Salem, was indebted to the complainants on the eighteenth February last, in the sum of eleven hundred and ninety-seven dollars and forty-two cents, on a promissory note payable on the twenty-seventh of March. On the seventeenth of February, Richard Moore entered up judgment against Reeves and one James W. Mulford, for sixteen hundred dollars, in the Salem pleas, and an execution was forthwith delivered to the sheriff of the county, directing him to levy and make thereon the sum of seven hundred and twenty-four dollars and sixteen cents of debt, and five dollars costs of suit. On the eighteenth of February, Thomas Reeves executed an assignment of all his real and personal property to his son, Daniel B. Reeves, and George W. Garrison, in trust for the benefit of his creditors, in pursuance of the act of 1820, and annexed to the assignment a schedule of his property and list of creditors, under oath, and duly acknowledged it. The deed of assignment was delivered on the same day to George W. Garrison, one of the assignees, who, as the complainants believe, was present at the time of the execution of it, and took it into his possession. On the same day, or the day after, he went to the house of Reeves, took possession of all his estate, real and personal, locked up his store, and took the key into his possession, and exercised various other acts of ownership over the said property, evincing his acceptance of the trust, and drew up the notice required by the third section of the act respecting assignments, mailed the same in the post-office at Salem to be inserted in one of the newspapers in Philadelphia, and afterwards took the same out of the office.

After the acknowledgment and delivery of the said assignment, and after Garrison had accepted of the trust, viz., on the eighteenth of February, and about two hours after the execution of the deed, Thomas Sinnickson entered up judgment in the Salem pleas against Reeves for four hundred dollars debt, besides costs, and sued out execution and delivered it to the sheriff.

On the nineteenth of February, Robert H. Van Mater entered up a judgment against Reeves for the sum of eight hundred dollars, and sued out an execution thereon. On the same day he entered up another judgment against Reeves, for seven hundred and forty dollars of debt, and sued out execution thereon.

The complainants then charge, that on the twentieth of the same month of February, Reeves, at the instance of Van Mater, became desirous to destroy the assignment, and for that purpose procured Daniel B. Reeves, one of the said assignees, to execute an instrument in writing, renouncing the trust; and also procured George W. Garrison to return the deed of assignment to him, Reeves, and return to him the possession of the real and personal estate, which was accordingly done.

After this, to wit, on the twentieth and twenty-second of February, sundry creditors of the said Thomas Reeves, viz., Robert H. Van Mater, Stoughton & Belden, Morgan & Buck, Samuel C. Dunn, and Rhoda Mulford, entered up judgments against him, and issued executions, and placed them in the hands of the sheriff of the county of Salem.

The bill charges that the judgment creditors had knowledge of the execution and delivery of the assignment at the time of entering up their judgments, respectively; that the sheriff has taken possession of all the property, and threatens to advertise and sell the same, and apply the proceeds to pay and satisfy the executions; that the assignees refuse to carry into effect the trusts in the deed of assignment, Daniel B. Reeves refusing to accept or act in any way, and Garrison, though he accepted the trust, refusing now to act any further or to carry the same into effect.

The bill prays that the assignment, and the trust therein contained, may be established and carried into execution under the direction of this court, and that the trustees may be decreed to execute the trusts according to the statute, or that they, or either of them, may be discharged therefrom, and that one of them may act, or a new assignee be appointed, to whom the trust estate shall be conveyed; and that the said judgments, so entered up after the execution and delivery of the said assignment, be decreed to be no lien on the said trust property; and that the estate may be applied, under the direction of the court, to the uses and purposes expressed in said assignment, for the equal benefit of all the creditors; that, if need be, a receiver may be appointed, and also an injunction issue to re-

strain the sheriff from selling under the executions. An injunction was ordered on the twenty-seventh of February, since which the several defendants have answered.

Thomas Reeves states, that being unable to raise money to satisfy the first judgment and execution against him, his great object was to obtain time, believing that he could convert his property into money and turn it in the payment of his debts better than any other person or persons could do. Not fully understanding the nature and force of an assignment under the laws of New Jersey, he was induced to believe that by making an assignment he would have a chance to turn himself so as to be able to sell his property and pay all his just debts. Under this impression he applied to George W. Garrison, and requested him to act as his assignee, to which he assented; and thereupon this defendant ordered an assignment to be drawn, constituting the said Garrison, and defendant's son, Daniel B. Reeves, his assignees; which assignment was executed in the presence of a subscribing witness, but was not acknowledged.

He further says, that he made a list of his property and of his creditors. This was in the evening of the eighteenth of February, and George W. Garrison took possession of the assignment, Daniel B. Reeves not being present. He did not solicit Daniel to act, but concluded he would not refuse. Next morning, Garrison came to the store, and began to talk about shutting it up. This was unexpected to defendant. He did not contemplate such a course of proceeding; for he had that morning, before Garrison came, opened his store, sold some articles, and one of his creditors calling, he had delivered him articles to the amount of upwards of twenty dollars in payment of a debt. The store was shut up by order of Garrison, and Daniel B. Reeves held the key. Next morning they all met at Salem; and Daniel B. Reeves, one of the assignees, having declined accepting the trust, he was advised that the assignment had no legal force, and believing that he could make arrangements with his creditors to give him time, and that he had property enough to pay his debts, and could manage it better than the assignees or any other persons, he requested Garrison to deliver up the assignment to be canceled. He did deliver it up, and this defendant canceled it.

He admits the several judgments and executions, and says, if he had been allowed to settle his affairs himself, and had obtained the time of one year, which Dr. Van Mater and Stoughton & Belden agreed to give him, and which agreement he

understood was assented to by Thomas Sinnickson, he has no doubt he could have paid all his just debts, and would have had a large surplus. He insists that he had a legal right to cancel the assignment; that no estate passed by it, nor did it create any trust; that the assignment failed to take effect, and was canceled without any fraud, collusion, or combination with any person or persons; not with the design of affecting the complainants, or other creditors, but with a view of replacing things in the same condition they were in before the execution of the assignment.

George W. Garrison says, in his answer, that Reeves called on him on the eighteenth of February, and proposed an assignment. He consented to act as one of his assignees. The assignment was drawn and executed, but not acknowledged, and delivered to him the same evening. Schedules of property and debts were made out, sworn to, and annexed to the assignment. Next morning, the nineteenth, he went to the store. Daniel B. Reeves and Thomas Reeves were there. Thomas appeared to consider the assignment as an instrument to keep off his bond and other creditors from bringing suits, and enable him to make sale of his property himself. Defendant requested Daniel B. Reeves to lock up the store for the present, and proposed that he and his father should come to Salem the next morning. They all met at Salem, when Thomas Reeves, believing he could obtain time from his creditors and could pay all his debts without great sacrifice, and do better than the assignees could, requested defendant to give up the assignment to be canceled. Daniel B. Reeves having declined acting, defendant was advised that in consequence thereof the assignment could not be carried into effect, and that he might lawfully deliver the said assignment; he accordingly did deliver it to the said Thomas Reeves, for the purpose of having it canceled. The defendant admits that he drew a notice for creditors, and it was withdrawn, and also that he requested Daniel B. Reeves to shut up the store. He admits also, that he stated or mentioned that an assignment had been made to him and Daniel B. Reeves, and he informed some of the creditors of it; and that he requested that the goods sold by Reeves on the morning of the nineteenth, in satisfaction of a debt, should be returned.

Daniel B. Reeves, the other person named as assignee in the deed of assignment, says he was not consulted or requested to act as assignee, nor did he consent in any manner to act; but at the request of Garrison he shut up the store and took the

key. That on conversing with his father he found that he was under a misapprehension as to the legal effect of the instrument, and without any collusion with his father or any other person, declined accepting the trust. He never saw the deed, nor does he know of it except from information.

The answers of the judgment creditors will be adverted to hereafter, if it shall become necessary.

Upon this state of facts, it is insisted that the injunction should be dissolved. The principal ground taken is, that no assignment was actually made; that the property never passed out of Thomas Reeves so as to vest in the assignees, and of course that no rights vested in the complainants and other creditors as *cestuis que trust*.

The assignment appears to have been prepared under the act, entitled, "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," passed the twenty-third of February, 1820. That act prescribes no particular mode in which such conveyances shall be made; and in the absence of any direction, we are to take it for granted that the usual formalities necessary to pass real and personal estate are to be observed. There must be a proper deed of conveyance, proper parties, and a due and proper execution. It must be signed, sealed, and delivered.

In this case, Thomas Reeves proposed to make an assignment of his property. An execution had been issued against him, which at the time he was unable to meet, and he called on Garrison to be one of his assignees, with his son, Daniel B. Reeves. Garrison consented to act; and thereupon Reeves had the instrument prepared. He signed and sealed it; and after making out an inventory of his property and a list of his creditors, under oath, and annexing it to the deed, he delivered it to Garrison, who received it, understanding what the object and effect of it were. That it was not acknowledged is not material. Proof by the subscribing witness would have had the same effect, and such proof was not necessary to the validity of the act on the part of the grantor. It was only important in case it had been desirable to have the assignment recorded, and the act does not fix any specific time within which it must be recorded.

The act was then complete, so far as Thomas Reeves was concerned. He had done all that was needful for him to do, and so far as the divesting of the estate depended on his act, it was accomplished.

George W. Garrison, one of the assignees named in the deed, accepted the trust. His answer is full, or at least sufficiently so to justify that conclusion; but he insists, that as the other assignee renounced, he was advised that he was under no obligation to act, and delivered up the deed to be canceled. How far he was correct in the conclusion, may be inquired into hereafter. It is necessary here to see whether Reeves, the other assignee, did or did not accept, and whether his renunciation was not at the instance of the assignor, and made expressly to defeat the assignment. The answer of Daniel B. Reeves is not as full and satisfactory as could be wished, and this is the more to be regretted, as the situation of the property and parties makes it important to settle the principles of the case upon this motion, if it can be done consistently. He states, that on the morning of the nineteenth, he was informed by George W. Garrison that his father had made an assignment, and appointed Garrison and himself assignees. Where he was informed of this; and whether, upon such information, he went to the store, or only happened there; or whether he lived there; and whether he knew, or had heard of the assignment from any other source before that information given him by Garrison, does not appear. Garrison and he were at the store. They were there either as assignees, or persons about to enter upon their duties as assignees. Reeves knew that the assignment had been made; that Garrison and himself had been appointed assignees; that Garrison was there in that capacity, in virtue of the assignment. Did he then refuse to act? Not at all; but on the contrary he, at the request of Garrison, locked up the store, and put the key in his pocket. Why take this responsibility, if he intended to have nothing to do with the assignment?

There is no particular formality necessary to the acceptance of a trust. If a person actually consent, or go to the property and exercise any power or right over it, it may be considered an acceptance, and especially where the rights of third persons are interested. It is not necessary there should be an actual consent, either in writing or by parol; acts fairly implying a consent are sufficient. In respect of this matter, the answer of Reeves is not satisfactory, and does not fully answer the equity of the bill. He did certain acts, but he says he did not act in any manner as assignee; yet I think it plain that he appeared there as assignee. He went with his co-assignee; they took possession of the property in the store, and it was no longer in Thomas Reeves.

After this, as appears by the answer, the son seeing the father greatly dissatisfied, and very anxious to avoid the operation of the assignment, concluded not to accept, but to go to Salem and take advice; and upon advisement, he executed a renunciation.

It is charged expressly in the bill, that this renunciation was fraudulent; and Daniel B. Reeves was expressly required to answer on his oath, whether the renunciation was at the request or instance of the said Thomas Reeves, and designed and intended to defeat the trust. To this he says, that he declined the acceptance in consequence of the difficulties which he perceived would be in his way, and without any collusion with his father or any other person. This is not a full and explicit answer. The defendant might well have renounced at the request of his father, and yet be under the impression that there was no collusion. Whether he did it at the instance or request of his father, he does not answer; nor has he paid any attention to the inquiry, whether the renunciation was designed and intended to defeat the trust.

The answer of this defendant not being full and satisfactory as to the acceptance of the trust, and as to the object, intent, and reason of relinquishing or renouncing it; and the acceptance and subsequent fraudulent relinquishment being one of the grounds of equity set up in the bill—the injunction can not be dissolved, even if there were no other grounds for retaining it.

But it is charged that the creditors, when they entered up their judgments, knew of the assignment; and that Reeves, the assignor, at the instigation of Van Mater, one of the judgment creditors, became desirous to destroy the validity of the assignment; and it is inquired whether the deed was delivered up at the request of said Van Mater, or any other of the judgment creditors, and which of them, and in their or either of their presence? Van Mater does not deny the fact of knowledge. It is true he absolutely denies any knowledge of the assignment except from hearsay. That was sufficient knowledge; and it is plain from the answer, though he neither expressly admits nor denies it, that he understood that an assignment had been made at the time of entering up his judgments. Sinnickson says he heard a rumor that an assignment was about to be made, and therefore he hastened to get his judgment; but he does not answer the interrogatory, whether the deed was delivered up at his request as one of the creditors. There is not a word about

it in his answer. This is singular, and the more so when it is seen by the answer of Thomas Reeves, that he believed, by canceling the assignment, he could make an arrangement with his creditors to give him time; and he states further, that Van Mater and Stoughton & Belden agreed to give him one year's time, and he understood this agreement was assented to by Sinnickson. Van Mater denies that the assignment was delivered up at his instigation.

If there be any equity growing out of the fact that these judgment creditors knew of the assignment when they procured their judgments, then, it is admitted by Van Mater, or certainly not denied. If any equity growing out of the fact that the deed was delivered up at the request of the judgment creditors, or some of them, then Sinnickson has failed to deny that equity; for in his answer he says nothing on the subject. In these, as well as in some other matters, the answers appear to be hastily and rather loosely drawn. And where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put, in relation to particular facts, the court can not be satisfied with a general answer, or one in any way evasive. It furnishes in this case an additional ground for retaining the injunction.

But grant, for the sake of argument, that there is no evidence of an acceptance on the part of Reeves, and that the delivering up of the assignment was without the instigation, advisement, or knowledge of any of the judgment creditors; divest the case of all fraud, actual or implied—have the complainants no equity to sustain their injunction? Was there no trust created by the execution of the deed, the annexation of the schedule and inventory under oath, and the delivery of the deed to Garrison, the assignee? Here was an actual and voluntary delivery by the grantor. He parted with his interest as far as it depended on any act of his. A trust was created; the beneficial interest vested in the creditors, the *cestuis que trust*, though they knew nothing of it. If Reeves refused to act—and he was at liberty to do so, as no man can be made a grantee against his will—the trust was not thereby destroyed. It vested in Garrison, the remaining trustee, who had accepted, and he was competent to go on and execute the trust.

There is an old manuscript case cited in 3 Eq. Cas. Abr. 742, and said to have been decided at the rolls in 9 Geo. II., which holds the doctrine, that where two are appointed joint trustees of real and personal estate, if during their joint lives one of

them refuses to act, the other can not act without him; but the trust devolves upon the court. If this was ever the doctrine of this court, it is not so at this time. It is now held, that where two trustees are appointed, and one dissents, the whole estate vests in the other: *Crewe v. Dicken*, 4 Ves. 100. In a later case in 2 Swanst. 365, *Nicloson v. Wordsworth*, Lord Eldon recognized the doctrine and says: It seems to have been taken for law from an older period than the date of *Crewe v. Dicken*, and sanctioned by Lord Hale, that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other; and he decided that a release by the trustee was equivalent to a disclaimer. The case decided by Lord Hale is from Vent. 128, *Smith v. Wheeler*. Property was conveyed to B. and C. upon certain trusts, and B. dissented. The plaintiff, claiming under a demise by C., recovered. Lord Hale is reported to have said, "C. is a good lessor, for the other trustee's disagreement makes the estate wholly his." A variety of old cases are referred to, but it is considered unnecessary to cite them. The principle is recognized in the late case of *Adams v. Thunton*, 5 Madd. 438, and Jer. Eq. Jur. 138, and may be considered as settled law.

If, then, a trust was created for the benefit of the creditors, it is the duty of the court to see that it is properly executed; and it is not seen as yet that the powers of the court are incompetent in this case to protect and secure the rights of all parties.

It is not necessary, perhaps not proper, in deciding this motion, that I should say more. The injunction must be retained for want of sufficient answers, and I incline to the opinion it should be retained on the merits of the case so far as at present developed.

Motion denied.

TRUST FOR BENEFIT OF CREDITOR may be created without his knowledge: *Shepherd v. McEvers*, 8 Am. Dec. 561.

For a further adjudication between the same parties, see next case.

SCULL v. REEVES.

[3 GREEN'S CH. 121.]

DEED OF ASSIGNMENT FOR BENEFIT OF CREDITORS can not be revoked by the grantor after it has once taken effect; and no subsequent cancellation of it by him can affect the rights of his creditors.

TRUST CREATED BY THE EXECUTION OF SUCH DEED is in the hand of the court, who will see that it does not fail for want of trustees, even though the assignees renounce or relinquish it.

IGNORANCE, ON THE PART OF THE ASSIGNOR, of some of the requirements of the statute and of the duties of the assignees, will not operate to set aside a deed of assignment.

TRUST IN SUCH CASE WILL BE CARRIED INTO EFFECT, although it be impracticable to comply with the statute in some matters, rather of form than substance.

BILL in chancery to establish the assignment referred to in the preceding case, from which, and from the opinion in this case, the facts sufficiently appear.

Wall, for the complainants.

Jeffers, for the defendants.

VROOM, Chancellor. The object of the bill in this cause was to establish an assignment made by Thomas Reeves to Daniel B. Reeves and George W. Garrison, in trust for the benefit of his creditors, under the statute, on the eighteenth of February, 1834, which trust was afterwards renounced by one of the assignees, and the deed given up to be canceled by the other one, on the twentieth of the same month. The complainants, who are general creditors, sought also to enjoin a number of judgment creditors, who had obtained judgment and execution after the assignment made and surrendered; and they alleged that the surrender and cancellation of the assignment was procured from Reeves by promises of the judgment creditors, that they would give him time of payment. On the coming in of the answers a motion was made to dissolve the injunction that had been granted on filing the bill; and after argument, the motion was denied, because, in the first place, the equity of the bill had not been fully answered; and also, because the court was inclined strongly to the opinion, from the answers themselves, that the deed of assignment had been duly executed and delivered; and that the trust having vested, the deed ought to be established for the benefit of all the creditors, whether it should turn out upon the evidence to have been delivered up by collusion or otherwise. The views of the court were fully expressed in the opinion pronounced at the last term,¹ and it is unnecessary to repeat them.

The cause came on to be heard on the merits, at the July term, and from the testimony of Thomas Reeves, the assignor, and Daniel B. Reeves and George W. Garrison, the persons

1. See preceding case.

appointed to act as assignees, there remains no doubt that the deed of assignment was duly executed and delivered, and that the assignees accepted the trust. It also clear, that the deed was not delivered up until the twentieth of February. Up to that time it was a valid, operative instrument. Everything necessary to give it effect on the part of the grantor, had been done, and the property was vested in the assignees for the purposes of the trust. There is great reason to believe, that the views of the assignor were changed by the representations and inducements made and held out by some of the creditors, to whom judgments were afterwards confessed. It was promised that a year's delay should be given. The execution of Moore, which was previously in the sheriff's hands, was to be arranged, and he was induced to believe that such course would be the best one for himself and all his creditors.

I do not think it necessary to inquire how far the conduct of those creditors who were instrumental in causing the deed to be given up and canceled, with the view of preventing or destroying the effect of the trust, is fraudulent or otherwise. For, if the deed took effect, as I am satisfied it did, it is not material to the creditors now seeking relief, whether the cancellation was fraudulent or accidental. The cancellation or destruction of the deed could not affect the rights of the parties. Nor had the grantor power to revoke it. He had given to his creditors a right, of which no power of his could divest them. It is not considered necessary to fortify so plain a principle by legal authorities. It is familiar and undoubted. The fact that one of the assignees renounced in writing, and that the other one relinquished the trust by giving up the deed of assignment, presents no serious obstacle to the execution of the trust. It was fully shown in the former opinion delivered in this case, that where the trust had once been created, it should not fail for want of trustees. It is in the hands of the court, to be executed under its direction, according to the law and the intention of the parties, and the court will see that it is properly done.

The principal ground of defense urged at the hearing, was, that Reeves, the grantor, was not acquainted with the nature and effect of the instrument; and that he executed it under a mistaken idea of its operation. There is some evidence which favors this position, but not sufficient to destroy the validity of a solemn deed. The whole evidence goes to show that his object was to distribute his property among his creditors, and he

thought there was enough to pay all. He made out a schedule of his effects, and a list of his creditors; and he expected to give up, and did give up, all, into the hands of his assignees. It is probable he was under some misapprehension as to the precise mode and time of making sale of his property. He might have been ignorant of some of the requirements of the statute and the duties of the assignees; but this would not operate to set aside the deed. I think, however, it is pretty evident, that these misapprehensions would have interposed no difficulty, had it not been for the promises of delay and forbearance held out by some of the creditors. After that, the difficulties appeared to thicken in the mind of the grantor; new views of the subject were presented and pressed; and, becoming a willing convert to the idea that it was better for him to manage his own concerns, he resolved it was best to pursue the course which would lead to that result; and, accordingly, he assented to the surrendering of the deed of trust, and afterwards destroyed it.

There being no well-founded objection to the instrument, it remains, as to its legal results, notwithstanding its destruction. It would be a reproach to justice, to suppose a want of power in this court to secure the rights of the *cestuis que trust*, and carry into effect the original intentions of the grantor.

Difficulties were suggested about a compliance with the statute in regard to advertisements and other proceedings, the time having passed. Many of these provisions are merely directory, and the rights of parties are not made to depend on a literal compliance. Such has been the course of decision by the supreme court, in cases of attachments commenced in the common pleas, and removed to the supreme court by certiorari. They have found no difficulty in carrying out the intention of the statute, although it was impossible to comply with all its requisitions as to matters rather of form than substance.

I shall accordingly decree in this case, that the trust be established, for the benefit of all the creditors, according to the provisions of the law on the subject of assignments, and to operate and take effect from the date of the deed; that the said Thomas Reeves be required to execute a deed in the usual form in such cases, to such trustees as the court shall direct or approve, and to annex to the same a schedule of his property as it was before it went into the hands of the receivers, and a list of his creditors with the amount due to them respectively; that these be filed and that the assignees proceed to execute the duties of their appointment as the statute requires.

The receivers will account to them, under the direction of the court, for the property they have received.

Decree accordingly.

TRUST NOT ALLOWED TO FAIL for want of a trustee: See note to *Dashiell v. Attorney-general*, 9 Am. Dec. 585.

VAN HOUTEN, MATTER OF GUARDIANSHIP OF.

[2 GREEN'S CH. 220.]

TESTAMENTARY GUARDIANS STAND IN LOCO PARENTIS, and supersede those appointed by the orphans' court.

MOTHER, ON DEATH OF A FATHER, SUCCEEDS TO HIM as guardian by nature; but when the father appoints a testamentary guardian, the natural right of the mother must yield to the will of the father.

FATHER'S INTENTION SHOULD BE CLEARLY MANIFEST in order to justify the taking away of this natural right of the mother.

EXECUTORS DIRECTED BY WILL OF TESTATOR to give to his infant son a good education, out of his estate, have the right to direct the education of such son, and to have the custody of his person so far as is necessary for that purpose; but this right should be exercised by them tenderly and discreetly, and with constant reference to the views and feelings of the mother.

PETITION of the executors of Abraham Van Houten, deceased, to have Abraham Van Houten, a minor, restored to their custody and guardianship, for the purpose of being educated according to the directions of the will of their testator. The executors first sent the boy to school near Newburg in the state of New York. On the closing of that school he returned home to his mother in Paterson, where he stayed six months. The executors then wished to send him back to Newburg to school, but his mother refused her assent and sent him to Caldwell, in New Jersey, to school, in order that, in case of sickness, he might be near her. The executors refused to pay his expenses since he had been at school at Caldwell. It was admitted that both the schools at Newburg and at Caldwell were good schools. The other facts are stated in the opinion.

Barkalow and Vanarsdale, for the executors.

Pennington and Williamson, for the mother.

VROOM, Chancellor. From the petitions filed in this case, and the statement of facts agreed upon, it appears that the question to be settled between the parties is as to the power claimed by each over the person of the infant. The mother,

Rachel Van Houten, claims as natural guardian, and also under the authority and appointment of the orphans' court of the county of Essex. Her letter of guardianship bears date the third day of July, 1826.

The executors claim under the will of the testator. After making provision for his wife, and disposing of certain parts of his estate, he gives all the residue of his property to his son Abraham (the infant), and orders his executors to rent out all his property lying in the towns of Paterson and Hackensack, and all his other houses and lots, and the proceeds thereof, with the personal estate, to put out to interest, for the benefit of his son, until he should arrive to the age of twenty-one years. Then follows this clause: "And I do further order that my executors give unto my said son, Abraham Van Houten, out of my estate, a good college education, and a decent support, until he arrives at the age of twenty-one years."

The father, while living, is the natural guardian and protector of his child; and he can not be divested of the privilege, except under extraordinary circumstances. The statute of Car. II. conferred on the father a power to appoint testamentary guardians, and the same right exists in this state under an act of the legislature. Where such guardians are appointed, they stand in *loco parentis*, and supersede those appointed by the orphans' court.

In case of the father's death, the mother succeeds to him as guardian by nature; but when a testamentary guardian is constituted by the father, the natural right of the mother must yield to the will of the father. It is paramount, and is considered a continuation of the father's authority. To take away from the mother this natural privilege, the father's intention should be manifest. The words are not important, for the intention will govern: Swinb., pt. 3, c. 12.

This is a question of construction, and if the rule of law were settled the court would conform to it; but the cases on the subject are few and unsatisfactory.

In *Bridges v. Hales et al.*, Mose. 108, the testator said, "I desire that my son and daughter may be under the care and direction of Sir Thomas Hales and Mrs. Hales;" and it was held to amount to the appointment of a guardian. That case is more full, and leaves less room for doubt, than the present. The care and direction of an infant, would seem almost necessarily to imply the guardianship; and it does not appear in that case that the mother was living.

In *Mendes v. Mendes*, 1 Ves. 90, Lord Hardwicke said, the declaration that the wife shall have the education of the children, may amount to a devise of the guardianship; but he does not decide that it will in all cases, or even as a general rule. It might have done so in that particular case; for the person claiming was the mother, who had the natural right.

It is given in 3 Salk. 176, as a rule of the civil law, that the guardian is to educate his pupil, *pro facultate patrimonii et dignitate natalium*; and this word, education, is said to comprehend food, raiment, lodging, physic, and schooling.

In these authorities there is nothing definite to guide us; yet it would seem that the leaning of the courts has been rather in favor of the right set up by the executors. Not being bound by any judicial decisions or course of practice in the courts, I feel at liberty to take such order in the premises, as a fair interpretation of the will and the justice and equity of the case before me appear to require.

And I think, in the first place, that by a just construction of the will in question, the executors are not constituted guardians of the person of the infant, so as entirely to supersede the natural rights of the mother, or those derived under the authority of the orphans' court. The intention of the testator is not so apparent to my mind, as to justify such construction. When the will was made, the infant was at the breast, and it can not be presumed that the father intended to give the absolute guardianship of him to strangers in preference to the mother.

I am, nevertheless, clearly of opinion, that the duties of the executors are not limited to the mere furnishing of the money necessary for the education of the infant. They are to give him a good college education. They are not only to provide the means, but they are to see that the thing is done; and for this purpose it is necessary that they should have some power. This must be either a power of supervision, or a power of direction. If of supervision merely, then it will be the duty of the executors to supply the necessary means; and if they are improperly appropriated, or not appropriated at all, to make application to this court for such aid as may be suitable to the exigency of the case. If of direction, then it appertains to the executors, when the infant has attained a proper age, to direct and control his education, by selecting the place or places where he shall be instructed.

In my judgment, it is the power of direction, and not of supervision merely, that belongs to the executors in this case.

This opinion is founded on what I consider to be a just construction of the will, as well as in the reason of the thing. The executors are to give the education out of the estate. It is a duty coupled with a trust. They are bound to supply means, but the amount and the manner of application, in its fullest extent, is clearly within their discretion. To give a good education, it is necessary that proper steps be taken early in life, and they must be diligently pursued till the matter is accomplished. In taking and pursuing these, soundness of judgment is to be preferred to tenderness of affection. There must be laid down and maintained a course of moral discipline, as well as mental training; and for this purpose much discretion is needed in selecting the persons under whose immediate care and government the infant is to be placed.

Generally speaking, the mother of an only son, is not the most suitable person to be charged with these important trusts; and hence it frequently happens that fathers, by their last wills, give the care and guardianship of their children to friends. In this case, the testator does not order the mother to give the education to the infant, and that the executors shall defray the expense out of the estate. If he had so ordered, it would have been conclusive. Not having done so, it affords ground for the opinion that such was not his intention. This opinion accords with what I consider to be the reason of the thing; and I feel satisfied, under these circumstances, to say, that the power of directing the education of the infant is vested in the executors.

Having settled the principle, the court feels bound to add, that the power of the executors is very far from being an absolute power, to be exercised arbitrarily and at their mere caprice. It should be exerted tenderly and discreetly, and with a constant reference to the views and feelings of the mother. It is right that she should be consulted as to the disposition of her son, and her desires gratified, if they may be consistently with his interest. In case of a difference of opinion, that of the executors is to prevail. But the mother ought to know, and the executors should always remember, that in case of any abuse of power, or any impropriety of conduct on the part of the executors, this court will always be open to hear complaints and redress grievances. It will look with a vigilant eye upon the conduct of those who are intrusted with the education of orphans, and whatever is wrong will speedily be made right. The general jurisdiction of chancery over them is complete, and the mother has a right to come in at any time and be heard

as against these executors. If, to use the language of Lord Macclesfield, the court shall have reason to suspect that the infant is likely to suffer by the conduct of the executors, or if they choose to make use of methods that may turn to the prejudice of the infant, the court will interpose and order the contrary: *Duke of Beaufort v. Berty*, 1 P. Wms. 705. The executors are invested with a delicate and responsible trust, and the court will interfere against their acts, if acting in a manner inconsistent with their duty: 2 Kent, 186; Jac. 245;¹ *Lyons v. Blenkin*, 4 Cond. Ch. 119. So the chancellor may at any time inquire whether the course of education pursued is such as it ought to be, and whether the school at which the infant is placed is a proper one.

It may be remarked, also, that the power of the executors is not to be extended by implication beyond what is reasonable and proper. It is not that of a guardian, and therefore when the child is not at school, he is to be under the care and protection of the mother; and she is at no time to be deprived of access to him, or prevented from ministering to his wants. In no event is he to be removed without the jurisdiction of the court without the consent of the mother, or the leave of the court.

The infant has been at the school in Caldwell upwards of a year. The court does not think it necessary to remove him thence, simply as evidence that the executors are re clothed with their proper authority. He must be considered as from this time under their control while he remains there. And as changes are frequently injurious, and no complaint has been made of the school where his mother placed him, he is not to be removed thence without having it referred to a master to report upon the expediency of such a measure. Such reference will be made at any time, upon proper application.

The executors will refund to the mother the amount disbursed by her since the first of July, 1833; and as the court sees no cause to censure either party, it is right that the costs of both petitions, and the proceedings thereon, be paid by the executors out of the infant's estate.

Something was said at the hearing as to the jurisdiction of this court, seeing that the mother claimed authority under a letter of guardianship issued by the orphans' court. I do not perceive that this appointment creates any difficulty. It gives the guardian all the power over the person of the ward, that

1. *Lyons v. Blenkin*.

could be given under the circumstances of the case; and this may be exercised consistently with the rights of the executors. These, although limited in extent, are, as far as they go, paramount and superior. Nor is it necessary for the executors to resort to a certiorari to have the letters revoked. The parties are now before the proper tribunal, and this court has power to do equal justice to all parties concerned, and regulate their respective rights and duties. The letters of guardianship are general, extending to both person and property, and they can be in no other form when emanating from the orphans' court: *Ten Brook v. McCalm et ux.*, 7 Halst. 97. Yet it will hardly be contended that they give a power to the guardian over the property of the ward; or that the executors, who have the power under the will, can not exercise it until these letters are annulled and set aside.

It is accordingly declared, that the right and power of directing the education of Abraham Van Houten, the infant, is by the last will and testament of Abraham Van Houten, deceased, vested in his executors, and that they are entitled to the custody of his person so far as is necessary and proper for the purposes of education.

And it is ordered that the said infant shall at no time be taken without the jurisdiction of this court, unless by the consent of the mother, or the leave of the court; and that the mother shall at all times have free access to him, and when not at school he shall be under her care; that he be not removed from his present school without a reference to a master; and that all parties be at liberty to apply to this court for direction.

And it is further ordered, that the expenses of the mother since the first of July, 1833, and the costs of both petitions and the proceedings thereon, be paid by the executors out of the estate of said infant.

TESTAMENTARY GUARDIANS.—The common law did not recognise the right of a testator to appoint a guardian for his minor children: *School. Dom. Rel.* 395; *Reeve Dom. Rel.* 453 (3d ed.); *Tyler on Inf. and Cov.* 249; 1 *Wooddes.* 275; *Reddall v. Leddiard*, 3 *Phillim.* 256; *Wardwell v. Wardwell*, 9 *Allen*, 519; *Lord v. Hough*, 37 *Cal.* 662; *Ex parte Earl of Ilchester*, 7 *Ves.* 370. In the case last cited, Lord Alvanley, C. J., said: "It is clear, by the common law a man could not, by any testamentary disposition, affect either his land or the guardianship of his children. The latter seems never to have been made the subject of testamentary disposition till the statute 12, Charles II." That statute, c. 24, secs. 8, 9, provided that any father, whether a minor or of full age, might, by deed executed in his life-time, or by his last will and testament in writing, dispose of the custody and tuition of his children, either born or unborn, for and during the minority of such children, or for any

shorter time, to any person or persons in possession or remainder; such custody to comprehend the entire care and management of his estate, both real and personal. Statute 1 Vict., c. 26, sec. 7, enacts that no will made by any person under the age of twenty-one years shall be valid. With this exception, the statute 12 Chas. II., to the effect above stated, is still the law in England: See *Ex parte Andrews*, L. R., 8 Q. B. 153; S. C., 4 Moak Eng. Rep. 261. This statute was quite extensively adopted in the United States: 2 Kent Com. 224, 225; Schoul. Dom. Rel. 399; Tyler on Inf. and Cov. 249; 1 Wms. Ex. 66, n. a; *Wardwell v. Wardwell*, 9 Allen, 518; *Balch v. Smith*, 12 N. H. 440; *Copp v. Copp*, 20 Id. 284; *McPhillips v. McPhillips*, 9 R. I. 536; *Williamson v. Jordan*, Bush. Eq. 46; *Ex parte Bell*, 2 Tenn. Ch. 327; Reeve Dom. Rel. 454, n. 1 (3d ed.)

POWERS OF TESTAMENTARY GUARDIAN.—The testamentary guardian has the custody of the ward's person, and of all his estate, real and personal, as well that which he acquires by purchase as that which comes to him through descent: Schoul. Dom. Rel. 395; Macphers. on Inf. 91; Bing. on Inf. and Cov. 163; Reeve Dom. Rel. 454 (3d ed.) And the power of the guardian continues during the minority of the child, unless sooner terminated by the terms of the instrument by which he is appointed: Schoul. Dom. Rel. 95; *Ex parte Reynolds*, 11 Hun, 41. This guardianship supersedes all the other guardianships: Reeve Dom. Rel. 454 (3d ed.) Under the English statute, and in those states in which the statute has not been materially modified by later enactments, the rights of the testamentary guardian are regarded as paramount to those of any one else, and not even the mother is permitted to interfere with the discretion of the guardian in respect to the custody and tuition of the ward: Tyler on Inf. and Cov. 286. Lord Chancellor Cottenham, in the case of *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 683, in discussing this subject, said: "It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with the testamentary guardians, and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians." This, no doubt, sounds like harsh doctrine in those states where the more humane spirit of modern progress has softened the rigor of the old law in regard to the rights of the mother to the care and custody of her children, but it is undoubtedly the law wherever the statute of 12 Chas. II. is still in force.

WHO HAS POWER TO APPOINT.—The father only had power to appoint a testamentary guardian, under the English statute, and so the law continued to be in those states that adopted it until a comparatively recent period: Tyl. on Inf. and Cov. 250; Macphers. on Inf. 82; *Balch v. Smith*, 12 N. H. 440; *Copp v. Copp*, 20 Id. 284; *Ex parte Bell*, 2 Tenn. Ch. 327. The mother had no right to exercise the power of appointment under any circumstances. And an appointment made by her was absolutely void: Macphers. on Inf. 83; *Bedell v. Constable*, Vaughn, 177; Bing. on Inf. and Cov. 165; *Ex parte Edwards*, 3 Atk. 519; *Villareal v. Mellish*, 2 Swanst. 536; *In re Pierce*, 12 How. Pr. 532; *Ex parte Bell*, 2 Tenn. Ch. 327; *Ex parte Turner*, 4 C. E. Green (19 N. J. Eq.), 433. A grandfather has no right to appoint a testamentary guardian for his grandchildren: *Hoyt v. Hilton*, 2 Edw. Ch. 202; *Fulleton v. Jackson*, 5 Johns. Ch. 278; *Williams v. Jordan*, Bush. Eq. 46.

In 1862, the legislature of the state of New York enacted that "no man shall bind his child to apprenticeship or service or part with the control of such child, or create any testamentary guardian therefor, unless the mother,

if living, shall in writing signify her assent thereto:" Laws of N. Y. 1862, c. 172, sec. 7, p. 345. This was the first legislative expression of the improved popular sentiment of the country upon this subject. It was the first revolt against the barbarism of the common law which merged the existence of the mother in that of the father, and denied to her any right to direct or control the nurture and training of her own offspring. In 1871, the revised statutes were amended by providing that "in cases such father shall be dead, and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, of every such child, may, by deed or last will duly executed, dispose of the custody and tuition of such child during its minority, or for any less time, to any person or persons in possession or remainder:" Laws of N. Y. 1871, vol. 1, p. 39, c. 32, sec. 1. In the *Matter of Reynolds*, 18 N. Y. 41, the court of appeals held that the appointment by the mother under this statute operates to prevent the appointment of a guardian upon the petition of an infant made after his attaining the age of fourteen. Provisions similar to those contained in the two New York statutes above referred to have been adopted in several of the states: Rev. Stat. of N. J. 1877, p. 465, secs. 1, 2; Hurd Rev. Stat. Ill. 1880, p. 577, sec. 5; Cal. Civ. Code, 1880, sec. 241; Rev. Code Dakota, 1877, p. 251, sec. 122; Ark. Dig. 1874, sec. 4198. In other states, it has been provided that, if the father is dead, the mother shall have the right to appoint a testamentary guardian for her children, in the same manner as the father could do: 2 Rev. Stat. of Ohio, 1880, sec. 6266; Rev. Stat. Tex. 1879, p. 367, art. 2497; Rev. Code Md. 1878, p. 487; Ga. Code 1873, sec. 1805.

The Rev. Code of Alabama, 1867, p. 493, sec. 2411, provides that the father may appoint a testamentary guardian for his minor children; but the mother is entitled to the custody of the person of the ward until it is fourteen years of age. It will be seen by reference to the statutes above named, that, within the last twenty years, very important changes have been made in the laws of many of the states of the union in reference to the power of appointing testamentary guardians. The tendency everywhere is to show greater regard to the right of the mother to have a voice in the appointment of a guardian for her children, or in their care and custody during that period of their lives when they most require a mother's care and counsel. In view of the evident tendency of modern legislation in this country, on this and kindred subjects, it is by no means a rash hope that in the very near future, the last relic of the barbarous act of Charles II. will be swept from the statute books of every American state. In Illinois, where the custody of a child is given to the mother, by a decree of divorce, for the father's fault, she may, by will, appoint a guardian for such child; and where such guardian is not shown to be an unfit person, and the child expresses a desire to remain with him, the court will not give the custody of the child to the father: *Wilkinson v. Deming*, 80 Ill. 342. But see *Taylor v. Jeter*, 33 Ga. 195, where it was decided that a decree divorcing husband and wife and giving the custody of the child to the mother, did not empower her to appoint a testamentary guardian in the life-time of the father. A father who has never abandoned his child, nor legally committed his custody and control to another, may appoint a testamentary guardian for such child: *Commonwealth v. Iearne*, 10 Phila. 199. A guardian can not appoint another guardian, for the office is one of personal trust, and not assignable: *Macpherson on Inf.* 83; *Bedell v. Constable*, Vaughn, 177; *Villareal v. Mellish*, 2 Swanst. 537; *Mellish v. De Costa*, 2 Atk. 14; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 121. And, wherever the statute of Charles II. is in force, either by re-enactment

thereof or as a part of the common law, no probate or orphans' court has power to appoint a guardian for a child for whom a testamentary guardian has been appointed: *Robinson v. Zollinger*, 9 Watts, 169; *People v. Kearney*, 19 How. Pr. 493; *Copp v. Copp*, 20 N. H. 284; *Lord v. Hough*, 37 Cal. 665. Although in the case last cited the court held, even before the enactment of the section of the civil code hereinbefore cited, that the statute of California had so modified the statute of Charles II. that the testamentary guardian appointed by the father could not take the personal custody and tuition of the minor from a mother who is competent, willing, and worthy to have such custody. A testator who devises property to a minor nephew has no power to appoint the father of such minor his guardian for the purpose of receiving and managing the property so given. Such appointment is wholly void: *Brigham v. Wheeler*, 8 Metc. 127.

GUARDIAN OF ILLEGITIMATE CHILD.—The right of a father to appoint a testamentary guardian does not extend to his illegitimate children: Bing. Inf. and Cov. 164; Tyl. Inf. and Cov. 253; Schoul. Dom. Rel. 388; *Sleeman v. Wilson*, L. R., 13 Eq. 36. The statutes of California and Dakota expressly grant to the mother of an illegitimate child the right to appoint a testamentary guardian for her child: Civ. Code Cal. 1890, sec. 241; Rev. Code Dakota, 1877, p. 251, sec. 122. And the statute of Maryland provides that an appointment of a testamentary guardian by a mother shall be as valid, in all respects, as if made by the father: Rev. Stat. Md. 1878, p. 487, sec. 11.

JOINT GUARDIANS.—Where two or more persons are appointed guardians, their authority is joint and several, and if one of them dies, resigns, or refuses to act, all the rights and powers of the guardianship vest in the others. And where two are appointed jointly, either may qualify without the other, and without summoning him to accept or renounce the guardianship: Bing. Inf. and Cov. 163; *Kenan v. Waller*, 11 Leigh, 414; *In re Reynolds*, 11 Hun, 41; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 102.

MODE OF APPOINTMENT.—It is immaterial by what form of words the appointment of a testamentary guardian is conferred, provided the testator's intention be sufficiently manifested by the instrument by which the appointment is made: Bing. Inf. and Cov. 165; Swinb., pt. 3, sec. 12; *Corrigan v. Kiernan*, 1 Bradf. 208; *Gaines v. Spann*, 2 Brock. 88. But the will by which a testamentary guardian is appointed must be a written one: *Dorsey v. Sheppard*, 12 Gill & J. 192. Such will need not, however, be proved: 2 Kent Com. 225; *Gilliat v. Gilliat*, 3 Phillim. 222. Nor is it necessary that letters of guardianship issue, in order to authorize the guardian to act: *Norris v. Harris*, 15 Cal. 226.

REMOVAL.—It is well settled, that a court of chancery has power to remove testamentary, as well as all other guardians, whenever sufficient ground for such removal is shown: Story Eq., sec. 1339, note 7; *Duke of Beaufort v. Berty*, 1 P. Wms. 703; *Butler v. Freeman*, Amb. 302; *Wellesley v. Duke of Beaufort*, 2 Russ. 21; *Wellesley v. Wellesley*, 2 Bligh (N. R.), 128; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 107; *In re Andrews*, 1 Johns. Ch. 100; *Ex parte Grumb*, 2 Id. 439; *Lord v. Hough*, 37 Cal. 663. In the United States, the power of removal is generally regulated by statute. Hence testamentary guardians may generally be removed by courts of probate in the same manner, and for the same causes, that other guardians appointed by such court may be removed: *McPhillips v. McPhillips*, 9 R. I. 536; *Massingale v. Tate*, 4 Hayw. 31; *Copp v. Copp*, 20 N. H. 284; Story Eq., sec. 1339, note a. But such guardians will not be removed, unless good cause for such

removal be shown: *Sanderson v. Sanderson*, 79 N. C. 369; *Copp v. Copp*, 20 N. H. 284; *Lord v. Hough*, 37 Cal. 664.

MARRIAGE OF WARD, EFFECT OF ON GUARDIANSHIP.—The marriage of a ward, whether male or female, terminates the guardianship as to the person: Schoul. Dom. Rel. 425. As to the estate, there is some conflict in the authorities both here and in England: Tyl. Inf. and Cov. 250; Schoul. Dom. Rel. 425, 426. The better opinion seems to be that it terminates the guardianship of the estate of the female ward, but not of that of the male ward: 2 Kent Com. 226; Schoul. Dom. Rel. 425; *Anonymous*, 8 Simons, 346; *Mendes v. Mendes*, 1 Ves. sen. 90; *Brick's estate*, 15 Abb. Pr. 12; *Macpherson*, Inf. 90; *Jones v. Ward*, 10 Yerg. 160; *Nicholson v. Wilborn*, 13 Ga. 467; *Armstrong v. Walkup*, 12 Gratt. 208.

QUACKENBUSH v. VAN RIPER.

[2 GREEN'S CH. 350.]

DEFENDANTS SERVED WITH INJUNCTION ARE PERSONALLY RESPONSIBLE for a violation of the order of the court, no matter in what capacity, nor with what view they acted.

INJUNCTION WILL BE GRANTED TO RESTRAIN A PARTY who is about to cause serious and irreparable damage to his neighbor's property; but it ought not to issue if the injury is comparatively small, and may be compensated in damages.

EQUITY WILL NOT INTERFERE BY INJUNCTION TO RESTRAIN A TRESPASS, where the injury does not appear to be irremediable and destructive to the estate, and where adequate satisfaction may be afforded by the ordinary legal remedy.

RULE to show cause why an attachment should not issue against the defendants, for a contempt in disobeying an injunction; and motion to dissolve the injunction.

Dickerson, for the complainant.

Ogden and Vanarsdale, for the defendants.

VROOM, Chancellor. On the twenty-first day of August, 1834, an injunction issued out of this court, directed to the defendants, commanding them to desist from building a dam across a certain stream called the Goffle brook, in the township of Franklin and county of Bergen, on the lands of the said Abraham Van Riper, so as by means thereof to flow back the waters of said stream on the land of the said Abraham A. Quackenbush, above his line, as designated by the bottom of the foundation of a dam, called the turning-mill dam, formerly erected on said line by one Jesse Chapple, the site of which foundation yet remains. The writ was served on the twenty-fifth of the same month, on each of the defendants personally.

The complainant, alleging that the injunction had been dis-

obeyed, applied for an attachment, and exhibited some affidavits in proof of the allegation; whereupon a rule was granted calling upon the defendants to show cause why an attachment should not issue against them. Testimony has been taken on both sides, and the question now is whether the rule shall be made absolute, or whether it shall be discharged.

A number of witnesses have been examined, and the evidence is somewhat contradictory; but I think the evidence of Samuel Quackenbush, Jacob A. Terhune, David Myers, and Joseph Baldwin, is conclusive to show, that the water is flowed back beyond the sill or foundation of the turning-mill dam. Three of them swear positively that it is still water for twenty-five paces above the sill. Myers and Baldwin are millwrights, and both state that the flowing back is owing to the dam of Van Riper below. This is not satisfactorily met or disproved by the answer or the witnesses of the defendants.

It is evident, therefore, that the command of the injunction has been violated and disobeyed by the defendant Van Riper. As to Munn and Whitehead, the other defendants, it is sufficiently proved that they were instrumental in raising the dam to its present height. They put on the last plank and pinned it. It is no justification to say, they did this to prevent injury to the dam, it being in part unfinished, or that the dam was not placed there at their expense or through their agency. They were parties to the bill. The injunction had been served on them, and in whatever capacity or with whatever view they acted, if the order of the court was violated, they are personally responsible. The rule must be made absolute as to all the defendants.

It is now moved to dissolve the injunction on two grounds: 1. That it was improvidently issued—there being no equity in the bill; 2. That the equity, if any, has been fully answered.

On looking again into the bill, I am satisfied that the injunction was properly ordered. The defendant, Van Riper, was building or erecting a dam across the brook, in lieu of the old one, which had been carried away by a freshet. The old one had flowed the water back above the complainant's line, and on his soil and freehold. An action had been brought in the supreme court, and a recovery had of one hundred and forty-five dollars, for the damages sustained. The source of the injury not being removed, another action was brought, and pending that suit the dam was swept away by a flood. I considered that the right of the complainant to the property on which the

injury was committed, had been established by a verdict and judgment at law, and that the injury sustained was of a permanent and irreparable character. Such was the fair inference from the bill; and my conclusion was that equity might properly protect the complainant in the enjoyment of his right, against any threatened injury of a similar kind. Hence the order was, that the water should not be raised beyond the sill, which it was supposed had been established as the line between the parties.

The necessary erection of a new dam, on or near the old site, presented a favorable opportunity for the complainant to claim the protection of the court. If the old dam had remained, this court could have afforded him no aid: he must have been left to his remedy at law. But when new works are to be erected on a former possession (the right having been established), equity may restrain: *Weller v. Smeaton*, 1 Cox Ch. 102.

The former dam of the defendant had been erected only six years. No grant to flow back the water could be presumed; the length of time was not sufficient, and the verdict of the jury was directly opposed to such presumption. Such being the case, it was within the legitimate power of the court to interpose so as to prevent future permanent mischief and injury to the complainant's possession.

It was supposed, from the scope of the bill, that if the defendant raised his dam, so as to flow back the water beyond a certain point, the injury formerly experienced must necessarily be renewed, and become permanent and destructive of complainant's property. Upon these grounds the injunction was granted.

The answer of the defendants admits the suit and recovery. It was prepared and filed after the dam was completed, and denies that there is any overflow on the complainant's lands; the defendant, Van Riper, claiming title to the land seventy feet above the turning-mill dam. The answer also alleges, that if the land is the complainant's, and any of it is overflowed, it is of little or no value, being covered with rocks or stones at the bottom, and high rocks on the sides, and about ten yards wide in the broadest place; that the land is not used for any particular purpose, and the complainant's mill above, is not injured in any way by the flowing back of the water.

How then stands the case on the motion to dissolve the injunction?

The answer expressly denies that there is any such flowing

back by the dam as now erected, as to occasion any serious injury to the complainant's land. That strikes at the equity of the case. The injunction was not intended to prevent any other injury, than such as might be occasioned by the flowing back of the water. None other is charged or suggested in the bill. It was not intended to enjoin the defendants against any possible interference, however small, with the complainant's rights. The writ is never used for such purpose.

If the case had been presented originally in the shape in which now appears, the injunction would not have been granted; and I think it ought not to be continued.

Every proprietor of land has undoubtedly a right to build a mill and raise a head of water on his own land. If in so doing he is about to cause serious and irreparable damage to his neighbor's property, equity will restrain him; but if the injury is comparatively small and may be compensated in damages, an injunction ought not to issue. The party injured should be left to his legal remedy. In using small streams for milling purposes, it is almost impossible to prevent partial injury to some proprietor, either above or below on the stream. If the injunction is to be used in every case of interference, very few of these streams could be appropriated to any useful purpose.

There is no charge in the bill, that the complainant is about to erect any other mills, or in any other way to appropriate or use the residue of the fall of the water on his premises, and that he is prevented from doing so by this dam. It is not pretended that there is any other mill site there. One of the witnesses who was examined, says the flowing back of the water will greatly injure the mill site of the complainant; but in the bill there is no such charge, nor is the aid of the court sought on that ground. There is no pretense that this flowing back of the water affects in any way the complainant's mill above. Against such a result, if properly charged and made out, the court would promptly and carefully guard.

If, then, the injunction is continued, it must be simply on the ground that the water is flowed back a short distance, say seventy-five feet, beyond the line, without doing any material injury to the complainant. And on the same ground, equity must interfere in all cases where the least possible invasion of private property is about to occur by the erection of a dam. It would have to adopt the principle, that an injunction will issue for the prevention of every trespass or infringement of right, when a suit at law might be brought. But that is not

the principle of this court. There are many cases in which trespass may be maintained, that will not justify an injunction. In *Jerome v. Ross*, 7 John. Ch. 331 [11 Am. Dec. 484], the established doctrine of the court was fully recognized, that equity will not interpose by injunction to restrain a trespass, where the injury does not appear to be irremediable and destructive to the estate, and where the ordinary legal remedy in the courts of law can afford adequate satisfaction. The trespass there was for entering upon the plaintiff's land, and digging, throwing up, and carrying away large parcels of stone from a ledge of stone and mass of rock on the premises. An action had been brought, and a recovery had, at law; but the court refused an injunction.

It is insisted, however, that there has been a trial and recovery for the injury, and therefore the complainant should be protected. There may be some doubt, from the answer, whether the title was in issue in the suit referred to. But suppose it to have been made a question, and settled by the verdict, in connection with the question of damages, the amount of the verdict justifies the conclusion that the injury as then presented and shown was not small and immaterial, but serious; and that the overflowing occasioned by the old dam was much greater than that caused by the present one. There is nothing in the whole case to show that the present dam flows the water back as far as the old one; and without this, the court can not infer that the same damages would now be given by a jury, or that anything more than nominal damages would be awarded. The dam is different, and the site is different, and though the water appears to flow to the mill through the same head-race as formerly, there is nothing to show that the quantity flowing through it is the same. The mill is now lower down the stream, and less water may answer.

A party having established his right at law, stands, in regard to trespassers and injuries of that character, in no better situation than one whose right is not disputed. Both are regulated by the same rule; and neither is entitled to the protection of this court by injunction, unless the injury is serious, and permanent, and destructive of the estate. I was induced from the bill to suppose that such injury would result from the dam in question, and this raised an equity in favor of the complainant. The answer of the defendant denies this equity; the facts do not support it, and the injunction must be dissolved.

I incline to believe that the breach of the injunction was not

intentional on the part of the defendants. It is proved that Van Riper gave special directions to his workmen, after the injunction was served, not to flow the water back beyond the turning-mill dam. The facts disclosed in relation to the interference of Munn and Whitehead, are strong to show that their object was not to condemn the order of the court. Under these circumstances, and seeing that the injunction is to be dissolved, no further order will be made as to the defendants, than that they pay the costs of the application, and also pay their own costs on the motion to dissolve the injunction: *Vide Partington et al. v. Booth et al.*, 3 Meriv. 148.

Order accordingly.

Approved and followed in *Vansickle v. Curtis*, 2 Green Ch. 428, to the point that a court of equity will refuse to interfere by injunction when the injury is neither serious nor immediate.

INJUNCTION AGAINST TRESPASS.—For a discussion of this subject, see the note to *Jerome v. Roe*, 11 Am. Dec. 498; see also note to *Hart v. Mayor of Albany*, 24 Id. 197, and note to *Scudder v. Trenton Del. Falls Co.*, 23 Id. 772, where the other cases in this series on this subject are collected.

LIABILITY FOR DISOBEYING INJUNCTION: See note to *Serv v. Armistage*, 13 Am. Dec. 313.

ALLEN v. TAYLOR.

[2 GREEN'S CH. 435.]

SUPPLEMENTAL BILL, WHEN ADDITIONAL RELIEF MAY BE SOUGHT BY.—

Where a bill is filed by a mortgagor against the mortgagee, before the mortgage is due, for an injunction to stay waste, the complainant may, after it has become due, file his supplemental bill to have the equity of redemption foreclosed, and the mortgaged premises sold.

MERELY FORMAL PARTY TO ORIGINAL BILL NEED NOT BE MADE A PARTY TO THE SUPPLEMENTAL BILL, where the new matter charged therein does not affect his rights.

LEAVE OF COURT SHOULD BE OBTAINED TO FILE SUPPLEMENTAL BILL; but where no objection is taken on this ground, it will be considered as waived by the voluntary appearance of the defendant.

BILL for an injunction to stay waste, and a supplemental bill to foreclose equity of redemption, and to have the mortgaged premises sold. The opinion states the case.

Eakin, for the defendants.

Jeffers, for the complainant.

VROOM, Chancellor. Some time since, the complainant filed a simple injunction bill to prevent the further commission of

waste on mortgaged premises. The defendants answered the bill, and upon the coming in of the answer the injunction was ordered to be dissolved. The order was not signed, nor was any application made to dismiss the bill. The mortgage money having become due, the complainant, in October, 1835, filed a supplemental bill, setting out that fact, and praying a decree for a foreclosure and sale of the mortgaged premises. To this bill there is a demurrer.

In my opinion this demurrer is not well taken. The complainant is regularly in court by the original bill, which is filed on the same mortgage. That bill sets out the making and executing of the mortgage, the amount for which it was given, and when due and payable, and shows that the mortgage money was not then due. It charges the commission of waste, and prays an injunction. The injunction was granted. The defendants answered the bill, denying the waste, but admitting the mortgage as charged. On the coming in of the answer the injunction was ordered to be dissolved. The complainant filed a replication in season, and put the cause at issue. At this time, the mortgage money having become due, the complainant filed a supplemental bill, setting out by way of supplement, the fact that the money had become due, and praying additional relief, viz., that the equity of redemption should be foreclosed, and the mortgaged premises sold.

I think this may be done, consistently with the principles and practice applicable to bills of this character. A strictly supplemental bill is always founded on facts that have occurred since the filing of the bill. These may be necessary to aid the complainant in obtaining the relief sought, or in obtaining new or additional relief. Here the party seeks additional relief, and if all the parties are already in court, upon the same subject-matter, I see no propriety in turning them round for the purpose of bringing a second suit. It is laid down as a rule in *Candler v. Pettit et al.*, 1 Pai. 169 [19 Am. Dec. 399], that if the complainant's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out the new matter in the form of a supplemental bill.

It may be that this principle is stated too broadly, but I think it may properly be applied to this case. It is said in *Eager v. Price et al.*, 2 Pai. 333, that the court will not permit a party to file two original bills, and carry on two suits at the same time against the defendant to satisfy the same debt.

The expense of an original bill is much greater than of a supplemental bill, and the latter should be used whenever it can equally subserve the purposes of justice. In this case the party seeks two kinds of relief. They are different in character, but both grow out of the same instrument, the mortgage, and spring from the relation of mortgagor and mortgagee. They might have been asked for in one bill, if sufficient facts had existed at the filing of the original bill to warrant it; but that not being the case, it was necessary for the complainant to ask such relief as his case would warrant. Subsequent events have entitled him to more extensive and effectual aid, and I see nothing to prevent his obtaining it in the usual way by bill of supplement.

The new matters charged not affecting the rights or interests of Dobson, who is a mere formal party to the original bill, it was not necessary to make him a party to the supplemental bill.

While on this subject, I would remark, that this bill appears to have been filed without leave first obtained of the court. This is irregular. An application for leave should always be made. No notice is necessary, unless the court, in a case of doubt, shall direct it to be given. No objection having been taken to the regularity of the proceedings on this ground, it will be considered as waived by the voluntary appearance of the defendants, and the demurrer.

Let the demurrer be overruled.

SUPPLEMENTAL BILL, WHEN MAY BE FILED: See note to *Candler v. Pettit*, 19 Am. Dec. 401.

DEPEYSTER v. GOULD.

[2 GREEN'S CH. 474.]

RESULTING TRUST, WHEN RAISED.—Where, at sheriff's sale under foreclosure, the premises are purchased by an agent who pays no part of the purchase money, but takes a conveyance in his own name, a resulting trust is raised in favor of the principal.

RECEIPT IN DEED IS NOT CONCLUSIVE; and where a question is raised as to the payment, parol evidence may be admitted to show by whom it was made.

ATTACHING CREDITORS DO NOT STAND ON THE SAME FOOTING AS BONA FIDE PURCHASERS; the latter are entitled to protection on account of the payment of a present consideration without notice; but the former are seeking to recover an old debt, and the rights of third persons are not affected by the attachment, although the attaching creditors be not affected by notice.

BILL for an injunction. The opinion states the case.

E. and G. Wood, for the complainants.

Gifford and Van Hook, for the defendants.

VROOM, Chancellor. Lewis Compton and wife, on the fifteenth of April, 1823, gave to Frederick Depeyster a mortgage on several lots in Perth Amboy, to secure the payment of one thousand five hundred and fifty dollars, due from Compton to Depeyster. The mortgage having been duly recorded, was afterwards placed in the hands of one of the solicitors of this court for collection. While there, Depeyster, being indebted in the sum of three thousand dollars to the Protestant Episcopal society for promoting religion and learning in the state of New York, of which he had been many years treasurer, gave his note for that amount to John Onderdonk, Martin Hoffman (both since deceased), and Thomas L. Ogden, acting as trustees on behalf of said society, and assigned over to Frederick Depeyster, jun., by way of collateral security for the payment of the said debt, certain securities, among which was the mortgage aforesaid with the accompanying bond. The assignment was in trust, to collect the principal sums and the interest thereon, and therewith to pay off and discharge the said debt; and to pay over the balance, if any, to the said Depeyster, the assignor. A bill was filed, to foreclose the mortgage, in this court, and a decree had; and the property was sold by the sheriff of the county of Middlesex, and purchased by Frederick Depeyster, as agent and in behalf and at the request of Frederick Depeyster, jun., who was then absent in Florida, for the sum of thirteen hundred dollars. The deed was made to Frederick Depeyster, sen., and recorded.

The purchase was made by Frederick Depeyster, sen., not on his own account or benefit, but on behalf of Frederick Depeyster, jun., the assignee, in trust, and of the society aforesaid. The purchaser did not pay the sheriff the amount of the bid, or any part of it, nor was it intended to be a charge against him, but was a credit to the mortgagor, and the purchase was really and in fact for the benefit of the assignee of the said mortgage, and those beneficially interested therein. Frederick Depeyster, jun., took possession of the premises, and leased them for eighty dollars per annum, in the name of Frederick Depeyster, sen., he being the formal owner of the legal estate, and has received the rents and profits, and accounted for them to the treasurer of the society aforesaid.

After collecting all the moneys that can be recovered on the other securities assigned (except thirty or forty dollars), there is a balance still due on the note given to the trustees of the said society, of two thousand and seventy-four dollars and seventy cents, or thereabouts.

In 1831, Sarah C. Gould, of the island of St. Croix, attached the premises as the property of Frederick Depeyster, sen., and such proceedings were thereupon had under the attachment, that in February, 1832, judgment was entered in favor of said Sarah C. Gould for four thousand five hundred and forty dollars and seventy-five cents; in favor of Matthew Clarkson and Catharine E., his wife, David F. Clarkson and John Clarkson, for one thousand five hundred and fifty-eight dollars and sixty-five cents; and in favor of William D. Green, administrator, etc., of Ann E., his wife, Frederick Depeyster Crommelin, Harriet Depeyster Crommelin, Mary A. Crommelin, Julia R. Crommelin, and Sarah M. Crommelin, administrator of Charles I. Crommelin, deceased, for two thousand four hundred and thirty dollars and twenty-eight cents.

The bill then charges, that the said attaching creditors, notwithstanding they have been made acquainted with all the facts above set forth, intend to proceed in their attachment and sell the mortgaged premises, and thereby annoy and attempt to defeat the equitable rights and interests of the said society, and throw a cloud over the title of the complainants.

The complainants pray an injunction, to prevent any sale under the attachment; and a decree that Frederick Depeyster convey the said premises to the complainant, Frederick Depeyster, jun., in trust for the said society; or that the society may be decreed to have a lien on the premises for the amount of the purchase money, in preference to any lien of the attaching creditors, and that the premises be sold, and the proceeds applied to the payment of the said lien, etc. On filing this bill an injunction issued.

The answer of Sarah C. Gould is merely formal, neither admitting nor denying the principal facts set forth in the bill. The Clarksons have filed no answer, their claims having been purchased in by one of the complainants.

The other defendants insist, that Frederick Depeyster, sen., purchased the property on his own account; and in support of the insistment, they place themselves upon the fact that Frederick Depeyster, jun., leased the property to a tenant in the name of Frederick Depeyster, sen., for eighty dollars per an-

num, and expressly on his behalf as the owner. They claim to stand in the situation of *bona fide* purchasers without notice of the alleged trust, or of the alleged non-payment of the purchase money for the premises; and insist that the purchase money is not a valid or subsisting lien upon the said premises as against the attaching creditors; and that, if the said trustees had any available interest in the premises, it can only constitute a charge against the said Frederick Depeyster. They charge, that Frederick Depeyster, jun., paid over no rent till March, 1832, which was long after the issuing of the attachment; and that Frederick Depeyster, sen., has repeatedly endeavored to sell the property by private contract, and assumed and exercised the ownership of it absolutely and for his own benefit, and that he did not hold it in trust. They further insist, that they are lawfully and equitably entitled to have the property sold to satisfy their debt, etc.

No replications are found among the papers, but the parties have proceeded to take testimony and produce exhibits; and the cause has been submitted in briefs.

It is proved, that Depeyster the elder, purchased the property at sheriff's sale for one thousand three hundred dollars. It is also proved, that he attended the sale with the intention, previously expressed, of taking care of the interests of his son, the trustee, who was then absent, and of preventing a sacrifice of the property. On the day before the sale he came to the office of William Johnson, the treasurer of the society for whose benefit the sale was to be made, and mentioned the absence of his son, and that some person ought to attend on his behalf. Depeyster was interested in the sale, and it was natural that he should feel solicitous that the property should not be sold for a nominal consideration.

It is proved that no part of the rents and profits of this property ever came to the hands of Frederick Depeyster, sen.; they were received by the trustee, and, after paying costs and repairs, were paid over to the treasurer of the corporation, according to the trust.

I think it also appears satisfactorily, that Frederick Depeyster, sen., paid no part of the consideration or purchase money. His pecuniary situation at the time, is strongly against the supposition. He was embarrassed and insolvent, and there is nothing to lead to the belief that he advanced any part of it. The relative position of the parties was such as to preclude the idea. He would not pay the purchase money without buying

in his own right. He could not buy in his own right without being guilty of fraud. He gave out his intention to attend on the part of his son, and buy the property in, if necessary to prevent a sacrifice; and if he had purchased the property for himself and paid for it, it would have been in violation of duty, and in bad faith. The docket of sheriff Edgar is proof that no purchase money was paid by Frederick Depeyster, sen. The suit stood in the docket in his name as complainant. In May, 1829, he purchased for one thousand three hundred dollars, and it is so entered. In April, 1830, he acknowledges to have received his deed as purchaser, and discharges the sheriff from any further liability. It is evident from this that no money passed. Depeyster being plaintiff and purchaser, the amount of the purchase money was so much raised on the mortgage. There was no need of payment. The sheriff considered him as the owner of the mortgage, and he being entitled to the proceeds of the sale, it was only necessary that he should acknowledge himself the purchaser, and discharge the sheriff.

The defendants insist on a variety of circumstances to show that the purchase was made by Depeyster for his own benefit, and that it was assented to by the son. They say, that, although the property was sold to Frederick Depeyster, in the absence of the trustee, his son, yet he permitted the father to take the deed after he returned home, and to have it recorded. It would have been much better to have corrected the inadvertence or mistake at an early stage of the proceedings. The deed should have been taken in the name of the trustee; and I do not see that any very satisfactory reason is assigned why it was not so done. Still the omission to do it does not warrant the conclusion that Frederick Depeyster, jun., thereby admitted that the beneficial title was in his father. He had given in his own name to the sheriff as purchaser, and it was right that the deed should be made out to him accordingly. His son had expressed his surprise that this should have been done. It was alleged to have been an inadvertence, and the trustee appears to have been satisfied, not anticipating any difficulty. It is a matter of surprise, however, that such an omission should have occurred, and it casts a shade over this part of the complainants' case. It may be that Mr. Depeyster, jun., thought the sheriff might have some difficulty in making out a deed to a third person, when the fact of the agency was not communicated to him at the time of sale, and when the purchase money was not to be paid by such third person on receiving the deed.

The sheriff certainly would not have done it, unless he could have been perfectly satisfied as to the assignment, the trustee, and the nature of the trust, all of which were matters he was under no necessity of inquiring into. It was his business to make the deed to the purchaser, on receiving the money or a discharge from the plaintiff. If such was the reason why the trustee interposed no objection to the deed being made to his father, it was a very natural one, and it would have been easy to have said so. No such reason is assigned.

The fact that in 1829, Frederick Depeyster, jun., leased the property as agent for his father, is brought forward to show the understanding of all parties that the purchase was not made by F. Depeyster, sen., as agent; and it is a circumstance entitled to some consideration. It was before the deed was made by the sheriff, and the legal title had not passed. This is susceptible of the same explanation as the one last adverted to. And in addition to that, it is proved that F. Depeyster, jun., the trustee, accounted for the use of the property to the treasurer of the society before mentioned. The first accounting was in November, 1830, which was before the attachment was sued out; and it is a satisfactory answer to the allegation, that the rents and profits were not accounted for by F. Depeyster, jun., until after the attachment, and was then resorted to as an expedient to cover over the truth of the case.

There are some other matters of minor importance which might be noticed, such as the receipt of the money in the sheriff's deed, and the offers to sell the property made by F. Depeyster, sen., but they are all susceptible of explanation. The receipt in the deed is not conclusive; and where an actual question is raised as to the payment, parol evidence may be resorted to to show by whom it was advanced: Sugd. 598, 6th ed.; Jer. Eq. 87. The whole of them taken together, do not compare with the evidence adduced to prove, that the property was bought by F. Depeyster for the use of the trustee and the society, and was so held. Nor do they at all affect the proof that no consideration was paid for the property by the purchaser.

The fact that the consideration was paid by the trustee, or that it came out of his mortgage, is satisfactory; and it raises a trust by implication of law—a resulting trust—in favor of the complainants. Trusts of this nature, says Lord Hardwicke, are, where the legal interest is in another, but the purchase money has been paid by a third person. This is a resulting trust

for him who paid the money: *Willis v. Willis*, 2 Atk. 71; *Lloyd v. Spillet et al.*, 2 Id. 150. The ground of this doctrine is, that he who paid the consideration is to be deemed the owner of the land, unless other presumptions arise to repel the conclusion: *Powel et ux. v. Monson & Brimfield Manufacturing Co.*, 3 Mason, 347. And the fact and manner of paying the purchase money may be proved by parol, as well when the consideration is stated in the deed to have been paid by the nominal purchaser, as when it is not; and it may be done either before or after his death: *Boyd v. McLean*, 1 Johns. Ch. 582; *Bolsford v. Burr*, 2 Id. 495; *Lench v. Lench*, 10 Ves. 511; Jer. Eq. 87; 3 Mason, 347, and the cases there cited.

This, then, is a resulting trust. The consideration was paid at the time by the credit on the mortgage; which credit, whether actually made or not, the mortgagor was entitled to receive upon the plainest principles of equity, and the mortgagee was, on the same principles, bound to allow. And therefore the objection, that there was no money actually paid at the time, can have no force.

The complainants are entitled to the benefit of this trust, unless it be true, as insisted on by the defendants, that they had no knowledge of it, and therefore stand, under their attachment, in the situation of *bona fide* purchasers for a valuable consideration, without notice. If this be so, their equity is superior to that of the complainants, and must prevail. But on this subject the defendants have misapprehended the law. Attaching creditors do not stand on the same footing as *bona fide* purchasers. These last are entitled to protection on account of the payment of a present consideration without notice. But attaching creditors are seeking to recover an old debt, and the rights of third persons are not affected by the attachment (or by a judgment for the same reason), though the attaching or judgment creditor may not be affected with notice: *Finch v. Earl of Winchelsea*, 1 P. Wms. 277; *Stevenson v. Pemberton*, 1 Dall. 3.

Upon the whole, I am satisfied that the equity of the case is with the complainants, and that the injunction heretofore granted should be made perpetual. As there is no evidence before me of the value of the property, and it may be worth much more than the one thousand three hundred dollars, or even the whole amount due the society, I shall decree that the property be sold under the direction of one of the masters of the court, and the proceeds be appropriated to satisfy, in the first place,

the costs of this suit on the part of the complainants, and then to satisfy the balance of the society's claim against Frederick Depeyster; and that the residue, if any, be brought into court for the use of the attaching creditors. The defendants are to pay their own costs; and they are exempted from the payment of costs to the complainants, on the principle that they had good ground for the attachment, there being no notice of the trust; and that being called into this court, there was reasonable ground for contesting the matter here, even after notice of the trust, growing out of some omissions of the complainants which are not well explained.

Decree accordingly.

RESULTING TRUST, WHEN ARISES: See note to *Kisler v. Kisler*, 27 Am. Dec. 313, and note to *Methodist Church v. Remington*, 26 Id. 68, and the cases in this series there collected.

ACKNOWLEDGMENT OF RECEIPT OF CONSIDERATION IN DEED NOT CONCLUSIVE: See note to *Whitbeck v. Whitbeck*, 18 Am. Dec. 507; *Bullard v. Briggs*, 19 Id. 292; *Pritchard v. Brown*, 17 Id. 431; *Chiles v. Coleman*, 12 Id. 396, note 401; *Bowen v. Bell*, 11 Id. 286; *Duwall v. Bibb*, 4 Id. 506, note 510; *Schemerhorn v. Vanderheyden*, 3 Id. 304, note 306; *O'Neale v. Lodge*, 1 Id. 377.

CREDITOR NOT BONA FIDE PURCHASER: See note to *Lockwood v. Bates*, 12 Am. Dec. 136.

ENGLISH v. ENGLISH.

[2 GREEN'S CH. 504.]

ELECTION OF WIDOW TO ACCEPT LEGACY IN LIEU OF DOWER, WHAT CONSTITUTES.—To constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be some decisive act on her part, with knowledge of her situation and rights, or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.

SIGNING APPLICATION TO LEGISLATURE FOR SALE OF THE REAL ESTATE, to enable the executors to carry out the testator's intentions, is not sufficient evidence of an election in law, where such application was never presented to the legislature or acted upon; nor is the filing of an answer to a bill in chancery, assenting to a decree for the sale of such real estate to carry into effect the trusts of the will, one of which was the payment of the annuity bequeathed in lieu of dower, where the widow who so signed was merely quiescent in the matter.

BILL by a widow, against her husband's executors, to establish her right to dower in the real estate of the testator. The opinion states the case.

Nevius, for the complainant.

Randolph, for the defendants.

VROOM, Chancellor. Dr. James English, by his last will and testament, duly executed according to law, gave to his wife Caroline a house and lot situate in the city of New Brunswick; so much of his household and kitchen furniture as she might choose to retain, a gold watch, her choice of the books in the library, and one thousand two hundred and fifty dollars in cash to be paid in one year after his decease. He further gave to his said wife the interest of six thousand dollars while she should remain his widow, to be invested in bond and mortgage under the direction of the orphans' court of the county of Monmouth; which bequest of the interest of the said six thousand dollars, was on condition that she received the same in lieu of her right of dower in his estate.

After some other specific devises and bequests, the testator gave all the residue of his property to certain religious and benevolent institutions in his will named, and directed his executors to apply to the orphans' court of the county of Monmouth for an order to sell all his real estate in said county, at such time and on such conditions, as in their judgment would secure the best sale.

At a suitable time after the testator's death, an application was made to the orphans' court for an order to sell the real property, according to the directions of the will; the executors setting forth in the petition, that the sum of the personal estate left, after paying debts, legacies, and expenses, was less than six thousand dollars, and not sufficient to enable them to pay to the widow her yearly interest without taking part of the principal, and therefore that a sale was necessary. The orphans' court declined acting in the matter for want of jurisdiction. A petition was then prepared to be presented to the legislature, praying a special act to authorize the sale. It was signed by the executors, Mrs. English the present complainant, and all the residuary legatees; and stated, among other things, the bequest of the annuity of six thousand dollars to the widow, and that the personal estate of the testator was insufficient to pay the debts, and the legacies to his widow and the other legatees named in the will. The petition not being prepared in time to be acted on by the legislature, was not presented.

Shortly after, the executors filed a bill in this court for relief, praying that the real estate might be directed to be sold, to

carry into effect the trusts in the will. To this bill Caroline E. English was made a party defendant, together with the residuary legatees. A joint and several answer was filed, in which Mrs. English expressly admitted that the rents of the real estate, together with the residue of the personal estate, after payment of debts and expenses, etc., would not be sufficient to pay the specific legacy and interest bequeathed to her in the will of her husband, and that the payment of the annual interest bequeathed to her would soon absorb the whole residue of the personal estate. The suit was so proceeded in, that in October, 1835, a decree was made upon the bill and answer, by the consent of all parties interested, directing and authorizing the executors to sell the whole of the real estate of the testator, and to apply the proceeds of such sale in a due course of administration of the estate, and to carry into execution the trusts of the will. The property was sold under the decree. After the sale, and before the time for executing the conveyances, it became known that the widow intended to claim her dower in the land, and not accept of the conditional legacy of the interest of six thousand dollars, as given in the will. To obviate this difficulty, it was agreed that the widow should release her interest in the real estate to the purchasers, and that the executors should retain in their hands the one third part of the purchase money, and pay her yearly and every year during her natural life, the interest accruing on the same—in case it should be determined, by agreement or otherwise, that she had not legally waived her right to resort to her dower in said lands.

Under this agreement, a bill has been filed in this court, by the widow against the executors, in which, after alleging that she has made no election to receive the annuity in lieu of her dower, she prays a decree that she is entitled to dower in all the lands and real estate of her late husband, in addition to the devise of the house and lot in New Brunswick, the sum of one thousand two hundred and fifty dollars, the furniture, books, watch, etc., upon her renouncing the bequest of the interest of said six thousand dollars.

The executors, in their answer, submit that the widow has made her election, and can not now claim dower. They say that before the application was made to the orphans' court for an order of sale, she had been informally applied to, to make her election; and that she had expressly and unequivocally, and against the advice of one of the executors, declared her fixed and unalterable determination to take the annuity instead of

her dower; that this determination was the basis of the application; that when the application failed, it was the mutual understanding of the parties that the executors should forthwith take such other measures as their counsel should recommend to effect a sale of the real estate, primarily and principally to pay the widow her said annuity; that consequently an application was prepared to be made to the legislature for a *spécial act*; that failing in this also, they prepared their bill of complaint in this court; that the proceedings and decree in that suit were based upon the fact that the widow had made her election to take the annuity instead of her dower; and that in order to raise the same it was necessary to effect a sale of the real estate; that she had full notice of all the proceedings, and either employed counsel, or consented and directed that counsel be employed, and all proper and necessary steps taken to effect the sale of the said real estate; that entertaining no doubt that the widow had made her election, they proceeded to sell the property without consulting her, and sold it free from all incumbrances, which they certainly would not have done if she had not elected to take the annuity. The defendants further say, that in all their conversations with her relative to this subject, they understood her as making or having made her election, and conducted themselves accordingly; that she remained, after the death of the testator, in possession of the mansion house and homestead farm for several months; that she voluntarily gave up the same to be sold without making any claim or pretense of dower, or any portion of the rents or profits of any of the real estate of which her husband died seised, and they feel satisfied that her present course is the effect of a change of views with regard to the contingency on which her said annuity is dependent, or a belief that in consequence of the great advance of real estate since the testator's death, the dower may be more valuable than the annuity.

There is a single point presented by the pleadings, and by the agreement of the parties. Has the complainant elected to take the bequest in lieu of dower?

The case is not within the supplement to the act relative to dower: Rev. L. 677. That provides for cases where lands or real estate are given to a wife for life or otherwise, and without expressing whether the devise is intended to be in lieu of dower or not. In this case there is no question as to the intention of the testator. He gave to his wife real estate in New Brunswick, but it is clearly expressed in the will that this devise was

not intended to be in lieu of dower, or to interfere with any claim of dower that she might make. The annuity was expressed to be in lieu of dower, and that alone. There is no ambiguity whatever upon the face of the will.

Nor can this case interfere with the construction given to the supplement, in *Stark v. Hunton*, Sax. 216; for there, there was no expression of the testator, that the land devised was not intended to be in lieu of dower. The statute clearly applied, and the opinion of the court as then expressed is to be taken as referring to such cases only. If, then, the widow has not elected to take the annuity, she is entitled to dower at common law; or, under the existing arrangement, to the interest of one third part of the purchase money, during life.

What acts of acceptance or acquiescence are sufficient to constitute an election, can not be designated with sufficient precision to justify a general rule. Each case, as it occurs, must be governed by its own peculiar circumstances. The general questions are, whether the parties acting or acquiescing were cognizant of their rights; whether they intended to make an election; whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time: *Dillon v. Parker*, 1 Swanst. 382, *in notis*.

The present case is free from any difficulty growing out of the rights of third persons. If the claim for dower had not been preferred until titles had been made by the executors, or the purchase money paid and possession rendered to the purchasers, it would have been difficult to restore the parties interested to their former situation, and the claim itself would have been canvassed with stricter scrutiny. It is also free from the objection growing out of a long-continued acquiescence in a state of things inconsistent with the assertion of the claim. All is of recent date; and there is no obstacle in the way of ascertaining the rights of the different parties.

I think the pleadings and evidence pretty clearly show, that it was for a considerable time after the death of the testator, the intention of the widow to take the annuity in lieu of dower. She openly expressed that determination at different times to one of the executors, and also to other persons. She appeared to feel that the will of her husband, so plain in its terms, and so liberal in its provisions in regard to herself, imposed on her a kind of moral obligation to comply with all its requirements, and carry out to the letter his benevolent intentions. But in

a case of dower, there must be something more than a mere intention to elect. The right to dower is a legal right. Upon the death of the husband, the widow is seised at law of a freehold estate, and that estate can not be divested by an intention or determination to take something else in lieu of it, no matter how often the intention may have been made known or communicated. Loose conversations with third persons to that effect, are of no account; and the making known of such determination, even to those who may be interested, will not of itself constitute an election in law. There must be some decisive act of the party, with knowledge of her situation and rights, to determine the election; or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons.

We have already remarked, that in this case no injury can accrue to third persons; and the question is to be settled upon the acts of the complainant. Of these, there are two entitled to consideration.

The first is, the joining in the proposed application to the legislature for a sale of the real estate, to enable the executors to carry out the intentions of the testator, in paying the legacies and executing the various trusts mentioned in the will. To the petition the name of the complainant is affixed in her own hand, and the fair presumption is she was acquainted with the contents and meaning of the paper. But this petition was never acted on; no application was ever made to the legislature for relief; no practical result grew out of it. The consent thus given for the sale of the property, was liable to be recalled at any time, and of course it can not be considered as decisive or binding so as to constitute a legal election.

The other act of the complainant is one of greater weight, and demands more consideration. After the application for a private law to authorize a sale was abandoned, the executors filed a bill in this court for a decree to authorize a sale of all the real estate of the testator not specifically devised. To this bill, the complainant in this suit, and all the residuary legatees, were made parties; and relief was sought on the ground that a sale was necessary to carry into effect the trusts of the will, one of which was the payment of the annuity to the complainant during her widowhood. An answer purporting to be a joint and several answer on the part of the widow

and the residuary legatees, was put in, merely echoing the charges of the bill, and joining in the request that a sale might speedily be made. And upon this a decree was made, directing the executors to sell on giving the notice prescribed in the will. If this proceeding had been in the ordinary form; if the answer had been sworn to, or even signed by the complainant, I should have considered it very difficult for me to overcome it. But there is good reason to believe that in all this matter she was merely quiescent; that the whole proceeding was conducted under the direction of the executors, founded on what they believed, and had reason to believe, was the fact, that all parties interested were desirous of a sale. The widow states that she gave no direction, employed no counsel, never saw or assented to the answer as prepared and filed; and when it is seen that the answer is neither signed nor sworn to by her, and that her statement is not denied by the defendants in this suit, it is fair to conclude that the statement is correct.

Under these circumstances, and seeing that she has interposed in season to prevent any injury to the rights of third persons, I feel unwilling to say that she is concluded by any act in reference to that suit. It is not clear to my mind, that anything therein done or permitted in her name, ought to conclude her; and I can not feel satisfied to divest her of a clear, certain, and legal right, upon doubtful evidence.

The acts which determine an election, as recognized in the books, are generally of a very decided character. In *Ardesoife v. Bennet*, 2 Dick. 463, there was the receiving of a legacy for five years. In *Butricke v. Broadhurst*, 1 Ves. 172; 3 Bro. C. C. 88, the widow entered on property and received the rents and profits for five years. And in *Earl of Northumberland v. Earl of Aylesford*, Amb. 540, there was an entry into possession and exercising acts of ownership. All these were held sufficient to constitute an election. See also *Sanger v. Wood*, 3 Johns Ch. 416. In this case the widow has never received any part of her annuity under the will.

This decision can not affect the decree made in the former suit. That will be found, on examination, not to rest on the ground that a sale was necessary to raise the annuity for the widow, for that fact is not even set forth in the decree; but on the ground that it was expedient to sell the real estate at that time to carry into effect the general purposes of the will. But even if any difficulty could have arisen in consequence of the

informality, it is cured by the release which has been executed on the part of the complainant.

If there are any other and prior claims of dower upon the property, as suggested in the answer, they are not to be affected by the allowance of the present claim.

I think that the widow is not, under all the circumstances, entitled to costs as against these defendants, and that they are entitled to receive their costs out of the assets of the estate.

Decree accordingly.

BAR OF DOWER BY ACCEPTANCE OF LEGACY: See *Gordon v. Stevens*, 27 Am. Dec. 445, note 448, and cases there cited.

AM. DEC. VOL. XXIX—67

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

PAYNE v. MATTHEWS.

[6 PACE CH. 19.]

JOINT CREDITORS OF AN INSOLVENT PARTNERSHIP are entitled to a preference over separate creditors of the individual partners in payment out of the property of the firm; and the separate creditors of an individual partner have a like preference over the partnership creditors in payment out of such partner's estate in case of his death or bankruptcy.

RIGHTS OF SOLVENT PARTNER OF DECEASED INSOLVENT.—Where a firm is dissolved, leaving one of the partners largely indebted to the concern, and the latter afterwards dies insolvent, his solvent surviving partner having been compelled to pay debts of the firm out of his own property, is entitled to share in the deceased partner's estate for the balance due him, equally with other creditors having unliquidated demands or accounts, etc., constituting debts of the fourth class under the statutes. **SUCH DEMAND MAY BE LIQUIDATED** by the surrogate in settling the estate, or by a decree of the court of chancery after a reference.

BILL filed by the complainant as surviving copartner of one Bissel, deceased, against the latter's representatives, to obtain a settlement of the copartnership business, and to restrain them in the mean time from paying away the property of the decedent's estate to his separate creditors, before payment of the complainant's claim, which included a certain balance due from Bissel to the firm on its dissolution shortly before his death, and also large sums paid out by the complainant on account of debts owing by the firm, as well as certain other sums paid out of the funds of the firm during its existence, upon Bissel's individual debts. An injunction having been granted, the defendants, on filing their answer, moved to dissolve the same.

J. Rhoades, for the complainant.

S. Stevens, for the defendants.

WALWORTH, Chancellor. The rule appears to be well settled that in a case of insolvency, the joint creditors of a copartnership are entitled to payment out of the property and effects of the firm, in preference to the separate creditors of the individual copartners; and that such separate creditors have a corresponding right to a priority in payment out of the individual estate of the copartners, in case of the death or bankruptcy of the latter so that such estate can not be reached by the partnership creditors by an execution at law: *Wilder v. Keeler*, 3 Paige, 167 [23 Am. Dec. 781]; *McCulloch v. Dashiell*, 1 Har. & G. 96 [18 Am. Dec. 271]. And where the surviving partner is in fact insolvent at the death of his copartner, equity will not allow the creditors of the copartnership, after exhausting all the joint effects of the firm for their sole benefit, to use the name of the surviving copartner, or to obtain a nominal payment of the residue of their joint debts from him, for the purpose of reaching a portion of the property of the deceased partner which, in such a case, belongs to his separate creditors upon this equitable rule.

I am not aware, however, that this principle of marshaling the effects, as between the joint and separate creditors where both copartners are insolvent, has ever been carried so far, except perhaps under the English bankrupt laws, as to exclude a solvent partner, who has a just claim against his copartner after all the debts of the firm have been paid, or who is obliged to pay the joint creditors out of his own private funds, from coming in for a share of the estate of the deceased partner. This appears to be a case of that kind. The partnership was dissolved previous to the death of Bissel, at which time he owed the firm a large amount; and the complainant, since that time, has been obliged to pay very large sums to the partnership creditors out of his own private funds. The principle adopted by the revised statutes is that equality among creditors is equity, in relation to the distribution of the estate of an insolvent decedent, except in those cases where the creditor had proceeded to judgment against the decedent before his death: 2 R. S. 87, sec. 27; 112, sec. 73; 453, sec. 37, etc.

The fourth class of debts in their order of payment as directed by the statute, includes all recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts. And the statute is express that no preference shall be given in the payment of one debt over another debt of this class. The balance due from the decedent to his surviving partner on account of the partnership transactions, after the

payment of the partnership debts and the appropriation of all the copartnership effects to equalize the balances between them, was an unliquidated demand of this class against the decedent at the time of his death; and when it shall have been liquidated by the complainant and the personal representatives of Bissel, or by the surrogate, who is competent upon the settlement and distribution of the estate to liquidate an equitable as well as a legal demand, or by a decree of this court upon a reference to a master, the balance that shall be found due to the complainant must be paid to him out of the estate of the decedent, ratably with the other creditors.

The motion to dissolve the injunction must therefore be denied. But as this was a new question on which it was proper for the personal representatives of Bissel to take the opinion of this court, the costs of both parties should be paid out of the estate of the decedent in their hands, if the claim of the complainant is now liquidated between the parties, without any further expense; and a decree to that effect may be entered upon filing the written consent of the parties, stating the balance which is thus ascertained to be due to the complainant.

PARTNERSHIP CREDITORS AND SEPARATE CREDITORS OF PARTNERS, respective rights of: See *Higberts v. Wood*, 24 Am. Dec. 236; *Grosvenor v. Austin's Adm'rs*, 25 Id. 743, and other cases in this series collected in the notes thereto. The foregoing decision in *Payne v. Matthews* is often cited as an authority for the general principle that partnership creditors of an insolvent firm are entitled to priority in payment out of partnership assets, while separate creditors of individual partners have priority over the firm creditors with respect to payment out of the property of such individual partners: *Jackson v. Cornell*, 1 Sandf. Ch. 350, 351; *Madison County Bank v. Gould*, 5 Hill, 314; *Averill v. Loucks*, 6 Barb. 480; *Muir v. Leitch*, 7 Id. 348; *Kirby v. Carpenter*, Id. 378; *Stewart's case*, 4 Abb. 409; S. C., under the title of *North River Bank v. Stewart*, 4 Brad. 257; *Thomson v. Thomson*, 1 Id. 34; *Hewitt v. Northup*, 9 Hun, 545; S. C. in court of appeals, 75 N. Y. 509. In *Kirby v. Carpenter*, 7 Barb. 373, however, it was held that where after the death of a partner the surviving partners paid debts of the firm, their relation to the deceased partner's estate was not thereby changed, but that they were merely subrogated to the rights of the creditors whose claims they had paid, and could come in for a share of such partner's separate estate only after his separate creditors were paid; and the principal case, so far as it is in conflict with this doctrine, was disapproved. See also the note to *Morgan v. Skidmore*, 3 Abb. (N. C.) 94, to the same effect.

THAT THE SURROGATE MAY ADJUDICATE EQUITABLE as well as legal claims in settling a decedent's estate, is a principle for which *Payne v. Matthews* is recognized as authority in *Goodyear v. Watson*, 14 Barb. 483; *Francisco v. Fitch*, 25 Id. 132; *Campbell v. Bruen*, 1 Brad. 231; *Babcock v. Lillis*, 4 Id. 220; S. C., under the title of *Sellis' case*, 4 Abb. Fr. 273; *Shaw's estate*, 1 Tuck. 362.

GUION v. KNAPP.

[6 PAGES OR. 32.]

RULE OF CHARGING DIFFERENT PARCELS of mortgaged realty, alienated at different times, in the inverse order of alienation, applies to conveyances at different times, with warranty, by a grantee of the mortgagor as well as to successive conveyances by the mortgagor.

MORTGAGEE HAVING RELEASED THE LAST PARCEL of the mortgaged premises alienated by the mortgagor from the lien of the mortgage, the value of such parcel being then sufficient to pay off the mortgage, can not resort to the parcels previously alienated, where he had notice of such alienations, and if he had no notice thereof the amount received upon releasing the parcel last conveyed must be applied before resorting to the other parcels.

RIGHT OF SO CHARGING ALIENATED PARCELS INVERSELY IS EQUITABLE, and not legal, and the incumbrancer is not affected by equities of which he had no notice.

MORTGAGEE HAVING NO NOTICE OF AN ALIENATION of part of the mortgaged land does not lose his lien thereon by releasing another part subsequently alienated.

BILL to foreclose a mortgage executed by Peter Knapp and wife in November, 1810, on a certain tract of three hundred acres, but not recorded until March 4, 1812. All the defendants appeared and answered, except Peter and Elijah Knapp, and the wives of several of the defendants, against whom the bill was taken *pro confesso*. It appeared upon the hearing before the vice-chancellor, that before the mortgage was recorded the mortgagors had conveyed sixty-four acres of the land to John Knapp, to whom the mortgagees subsequently executed a release, and had also conveyed, with warranty, another parcel of seventy-six acres to Elijah Knapp, who had notice of the mortgage. The mortgagors afterwards made other conveyances of parcels of the mortgaged premises as follows: April 9, 1812, twenty-five acres to P. Knapp, jun., who conveyed to one Skellie; March, 1814, about thirty-two acres to one Palmer, who conveyed a part thereof to one Millard (under whom the defendant Raymond holds), and another part subsequently to Guthrie, defendant, and the residue to Snow, defendant; April 24, 1814, about six acres to one Humphrey; October, 1816, fifteen and thirty-nine one hundredths acres to one Crandall, who gave a mortgage for the purchase money, which was assigned to Isaac and James D. Knapp, and afterwards foreclosed, and the premises sold to a purchaser who conveyed to the assignees of the mortgage, who in turn conveyed a little over seven acres of the land to Hillman, defendant, the re-

mainder of the fifteen and thirty-nine one hundredths acres subsequently becoming the property of one Kellogg by a purchase on execution against Isaac and James D. Knapp, the said Kellogg afterwards contracting to sell the same to Burdick, defendant; April, 1819, about twelve acres to one Eggleston, who conveyed to Skellie, defendant; March 6, 1820, about sixty acres to John Knapp, who conveyed to Isaac Knapp, who conveyed about forty acres, in August, 1822, to one Hammond, to whom the mortgagees executed a release in August, 1823, and the remaining twenty acres, with warranty, to Patterson, defendant, in January, 1823.

The mortgagors conveyed the residue of the mortgaged premises, about seventy-one acres, to Isaac and Silas Knapp, in April, 1820; and the latter conveyed to Hillman, defendant, to whom the mortgagees executed a release in June, 1825; at which time none of the conveyances executed by the mortgagors had been recorded except those to Palmer and Humphrey, which were recorded before August, 1823. The mortgagees had actual knowledge of the conveyance to Crandall in 1816, as appears from facts stated in the opinion. The mortgagees had no actual notice of any other conveyances by the mortgagors except those for lands for which they had executed releases. Other facts appear from the opinion. The decree of the vice-chancellor was that an account be taken of the amount remaining due after applying to the mortgage the value of the land last released; that if nothing remained due, the bill should be dismissed with costs; that if anything remained due after such deduction and after applying two thirds of the value of the land released to Hammond, then the twenty acres conveyed to Patterson should be sold, and the proceeds applied thereto; then, if necessary, the value of the remaining third released to Hammond; then the land of the other defendants in the inverse order of alienation by the mortgagors. The complainants appealed.

J. V. L. Pruyn, for the appellants.

M. T. Reynolds, for the respondents.

WALWORTH, Chancellor. Assuming, for the present, that the vice-chancellor was right in the principle upon which his decree in this case is based, the decree appealed from is erroneous in some of its provisions. The principle of charging different parcels of the mortgaged premises, which have been sold at different times subsequent to the mortgage, in the inverse order

of their alienation, is not always confined to the original alienations by the mortgagor who is personally liable for the payment of the debt. The principle is equally applicable to several conveyances at different times, by a grantee of the whole or a part of the mortgaged premises, where he conveys with warranty. Thus, if the mortgage is a lien upon two hundred acres of land, and the mortgagor conveys one hundred acres thereof to A., the one hundred acres which remains in the hands of the mortgagor is to be first charged with the payment of the debt, and, if that is not sufficient, the other one hundred acres is next to be resorted to. But if A. has subsequently conveyed one half of his one hundred acres to B. with warranty, the fifty acres remaining in the hands of A. is, in equity, first chargeable with the payment of the balance of the debt which can not be raised by a sale of the one hundred acres that still belong to the mortgagor or his subsequent grantee, before resort can be had to the fifty acres which A. has conveyed with warranty. And if A. conveys his remaining fifty acres to C., either with or without warranty, that portion of the premises is still liable for the balance of the mortgage debt, and must first be sold, before a resort can be had to the fifty acres previously conveyed with warranty to B. In the language of Chancellor Kent, C. sits in the seat of his grantor, and must take the land with all its equitable burdens: 5 Johns. Ch. 241.¹

By the decree which is appealed from in this case, the vice-chancellor directs the lands of Patterson to be sold only in case the whole mortgage debt is not satisfied after applying two thirds of the value of the lands released to Hammond by the mortgagees. But by referring to the exhibits, it will be found that Isaac Knapp was the owner of the whole sixty acres conveyed in March, 1820, to John Knapp, at the time of his conveyance of the north two thirds thereof to Hammond with warranty, in August, 1822, about five months before he conveyed the south third of the sixty acres to the defendant Patterson. This south twenty acres, therefore, was primarily liable, in the hands of Isaac Knapp, for the payment of the mortgage debt, before a resort could equitably be had to the forty acres which he had first conveyed to Hammond. And when Patterson afterwards purchased that twenty acres, in January, 1823, he took the land charged with all the equitable burdens which existed against it in the hands of his grantor. These two grantees

1. *Clowes v. Dickenson.*

of Isaac Knapp, therefore, stood in the same relation to each other, in reference to the lien of this mortgage, as if they had derived their titles to their respective portions of this sixty acres directly from the original mortgagors of the premises by conveyances of different dates. And as the proceeds of Patterson's twenty acres was the primary fund for the satisfaction of the lien of the mortgage on the whole sixty acres, the release to Hammond could not in any way impair the lien of the mortgagees upon that twenty acres. But as Isaac Knapp had also conveyed to Patterson with warranty, and was bound to see that his land was discharged from the lien of the mortgage, the three hundred dollars received of him by the mortgagees, as the consideration of the release to Hammond, must be applied upon the mortgage, if it has not already been done, before any resort can be had to the lands of Patterson.

The seventy acres conveyed to Isaac and Silas Knapp, in April, 1820, and released from the lien of the mortgage in June, 1825, was the last parcel of the mortgaged premises which was conveyed by the mortgagors. And it was worth, at the time it was so released, more than sufficient to satisfy the balance then due on the mortgage, at the lowest estimate of its value as fixed by any of the witnesses; even if the complainants' bill contains a correct statement of all the payments which had been made upon the mortgage previous to that time. If the complainants, therefore, are chargeable with notice of the equitable rights of the respective grantees, under the previous conveyances of the several other parcels of the mortgaged premises by Peter Knapp and wife, the bill should be dismissed as to all the defendants who have appeared and answered, with costs. And a reference to compute the amount would in that case be wholly unnecessary, and a useless expense to the parties. On the other hand, if the complainants are not chargeable with either actual or constructive notice of the previous conveyances from the mortgagors, at the time when the release of the seventy acres was executed, the amount actually received by the complainants on the execution of the release should alone be taken into the account in ascertaining what is due upon the mortgage; and if anything remains still due, the lands of the several defendants, which have not been released, should be charged in the inverse order of their alienation.

The answer of the defendant Burdick contains a distinct allegation, that at the time of the execution of the releases of the four hundred acres to Hammond, and of the seventy acres

to Hillman, the complainants knew of the conveyance to Crandall, in 1816; and this allegation is sustained by the proof. At the time of the conveyance to Crandall he gave back to Peter Knapp a bond and mortgage upon the same premises, for four hundred and sixty-seven dollars. And from the recitals in the release to John Knapp, executed by the Guions in March, 1817, it appears that such bond and mortgage was actually assigned to them by Peter Knapp, as an additional security for the payment of their debt.

This is the same mortgage which was afterwards assigned to Isaac and James D. Knapp, and foreclosed by them; and through which the defendants Burdick and Hillman have derived their title to the two small pieces of the mortgaged premises, now claimed by them respectively. How this bond and mortgage came to be relinquished by the Guions does not appear; but the recital is conclusive to show that they must have known that Peter Knapp had conveyed away this part of the mortgaged premises, previous to 1817. It was also notice to them of the rights of Humphrey and of Palmer, and of the grantees of the latter, as the one hundred acres of Crandall is bounded on their lands. This certainly was sufficient to make it their duty to inquire and ascertain what were the equitable rights of those prior grantees of Peter Knapp, before they undertook to discharge the lands which had been conveyed by him long subsequent to that time, from the lien of their mortgage. And as the deeds to Humphrey and to Palmer were both on record, there could have been no difficulty in ascertaining their rights by an inquiry at the clerk's office. I presume there was no intention, on the part of these mortgagees, to defraud the previous purchasers of their rights; but as these complainants have by their negligence released lands, which were primarily liable for the payment of their mortgage, of nearly double the value of what was due thereon at the time such releases were given, they have no equitable claim to come here for relief against those who in equity were entitled to be exonerated from the lien of the mortgage. The complainants' bill should therefore be dismissed as against the defendants Burdick, Hillman, Humphrey, Raymond, Guthrie, and Snow, with costs.

The case is different in respect to the lands claimed by the defendants, Patterson, Skellie, and Elijah Knapp. Neither of those defendants, or the grantees under whom they claim, had taken the precaution to have the deeds under which they

claimed title recorded; so that it could not be ascertained by a search in the proper office, that Peter Knapp had conveyed the lands claimed by them, previous to the conveyance of the seventy acres to Isaac and Silas Knapp, in April, 1820. And there is no evidence whatever in this case, that the complainants had any notice, either actual or constructive, of their equitable rights, as prior purchasers, at the time the releases to Hammond and to Hillman were applied for and given.

The right to have the lands, which have been sold by the mortgagor, charged in the inverse order of their alienation, is not strictly a legal but an equitable right, and is governed by those equitable principles upon which this court protects the rights of sureties, or those who are standing in the situation of sureties. And the conscience of the party who holds the incumbrance is not affected, unless he is informed of the existence of the facts upon which this equitable right depends; or he has a sufficient notice of the probable existence of the right to make it his duty to inquire, for the purpose of ascertaining whether such equitable right does in fact exist. If, therefore, the prior purchasers are so negligent as to leave the holder of the incumbrance to deal with the mortgagor, or with a subsequent grantee of a portion of the premises under the erroneous supposition that the lands conveyed to the prior purchasers still belong to the mortgagor, the mortgagee will not lose his lien by executing a release to one who happens to be a subsequent grantee. The principle that a creditor having a lien on two funds may discharge the lien as to one without impairing his legal claim on the other, if he has no reason to suppose it will interfere with the equitable rights of any one, was distinctly recognized and asserted by Chancellor Kent, in the case of *Cheesebrough v. Millard*, 1 Johns. Ch. 409 [7 Am. Dec. 494]. To deprive a creditor of his legal claim against the property of a person standing in the situation of a surety on the ground that such creditor has done an act which is inconsistent with the equitable rights of a surety, not only the fact of suretyship must exist, but it must be known to the creditor at the time of the act complained of: *Neimcewitz v. Gahn*, 3 Paige, 614; S. C., 11 Wend. 123. I do not think there is anything in this case which will authorize a decree discharging the lands of Patterson, Skellie, and E. Knapp from the lien of the mortgage, if anything is due thereon after crediting the amounts actually received as the consideration for the releases.

The decree of the vice-chancellor must therefore be reversed,

but without costs to either party on this appeal. And a decree must be entered declaring the lands of Burdick, Hillman, Humphrey, Raymond, Guthrie, and Snow, discharged from the lien of the mortgage, and dismissing the bill, as to them, with costs. A reference must also be directed to a master residing in the county of Onondaga, to ascertain and report how much, if anything, is due upon the bond and mortgage; and, upon the coming in and confirmation of the report, if it shall appear that there was nothing due on the bond and mortgage at the time of filing the bill, or that the amount then due was not sufficient to sustain the jurisdiction of the court, the bill is to be dismissed with costs as to Patterson and Skellie. But if it shall appear that a sum sufficient to sustain the jurisdiction of the court was due, then the lands of Patterson, Skellie, and Elijah Knapp, or so much thereof as may be necessary to pay the amount reported due and interest, together with the complainants' costs, exclusive of their costs on this appeal, must be sold in the inverse order of alienation. The usual directions in other respects are to be inserted in the decree.

ALIENATION OF DIFFERENT PARCELS OF MORTGAGED LAND.—The rule applied in the different states with respect to the manner of charging different parcels of mortgaged realty which have been alienated by the mortgagor at different times; is discussed in the note to *Morrison v. Beckwith*, 16 Am. Dec. 141, where it is shown that the doctrine which prevails in most of the states is that such alienated parcels are to be charged in the inverse order of alienation, after exhausting that which is retained by the mortgagor. The same principle applies where land under a judgment lien is sold in distinct parcels to successive purchasers: *Stoney v. Shultz*, 27 Id. 429. The rule in Iowa and Kentucky, however, is that alienated parcels of mortgaged land shall contribute ratably. A purchaser of part of a tract under mortgage will be protected if the residue is sufficient to satisfy the mortgage: *Nelson's Heirs v. Boyce*, 23 Id. 411. The principal case is often cited as an authority for the general doctrine, that where land is subject to a lien by mortgage or otherwise, and different parcels of it are alienated at different times, the original creator of the lien, or the person who is liable to discharge it himself, retaining part, the part so retained is first to be sold to satisfy the lien, and then the other parcels in the inverse order of alienation: *Steele v. Sparker*, 8 Paige, 195; *St. John v. Bumpstead*, 17 Barb. 102; *Woods v. Spalding*, 45 Id. 608; *Chapman v. West*, 17 N. Y. 127; *Barnes v. Mott*, 64 Id. 402; *Green v. Milbank*, 3 Abb. (N. C.) 155; *Steele v. Childs*, 15 Hun, 518; *Iglehart v. Crane*, 42 Ill. 267.

RELEASE OF PART OF A MORTGAGED TRACT, EFFECT OF: See *Stevens v. Cooper*, 7 Am. Dec. 499. The rule laid down in *Guion v. Knapp*, that where a mortgagee releases part of the mortgaged premises after an alienation of another part, of which he had notice, the value of the part released must be first applied to the mortgage before resorting to the part alienated, but not where he has not either actual or constructive notice of the prior alienation, is referred to with approval in *Patty v. Pease*, 8 Paige, 285; *La Farge Fire*

Ins. Co. v. Bell, 22 Barb. 63; *Howard Ins. Co. v. Halsey*, 8 N. Y. 273; *Catgrove v. Tallman*, 67 Id. 98; *Wheelerwright v. Depeyster*, 4 Edw. Ch. 243; *George v. Wood*, 9 Allen, 83; *McLean v. Lafayette Bank*, 4 McLean, 436; *Stuyvesant v. Hone*, 1 Sandf. Ch. 423; S. C. on appeal, 2 Barb. Ch. 157. In the latter case, however, at the hearing before the assistant vice-chancellor, Sandford, his honor argued very strenuously that Chancellor Walworth, in the principal case, did not mean to lay down the doctrine that in such a case the recording of the deed on an alienation of part of the mortgaged premises would affect the mortgagee with constructive notice of such alienation: 1 Sandf. Ch. 426. When the case subsequently came before Chancellor Walworth on appeal, he declared this conclusion of the assistant vice-chancellor to be correct. Said he: "The assistant vice-chancellor is right in supposing that this court, in the case of *Guion v. Knapp*, 6 Paige, 35, did not intend to decide that the recording of a subsequent deed, given by the mortgagor, was constructive notice to the mortgagee of the equitable right of the grantee in that deed to have the residue of the mortgaged premises, not embraced in his deed, first charged with the amount due upon the mortgage. In that case the mortgagees had taken an assignment of a subsequent mortgage of a part of the mortgaged premises, which mortgage upon its face showed that Humphrey and Palmer had purchased parts of the premises covered by the original mortgage. This was held sufficient to make it their duty to inquire as to the equitable rights of Humphrey and Palmer, in reference to the mortgage, before the lands still belonging to their grantor were released. And the recording of the deeds to Humphrey and Palmer is only referred to by the court to show that if such inquiries had been made there would have been no difficulty in ascertaining their equitable rights, from the examination of the records alone." *Stuyvesant v. Hall*, 2 Barb. Ch. 153. The principal case is referred to on the same point in *Trustees v. Wheeler*, 61 N. Y. 108, where it is held, following the opinions expressed both by the assistant vice-chancellor and by the chancellor in *Stuyvesant v. Hone*, *supra*, that the recording of a mortgage is constructive only to a subsequent purchaser or incumbrancer. See, to the same effect, *Truscott v. King*, 6 Barb. 349, also referring to the "erroneous impression" derived from *Guion v. Knapp*, on this point.

MOWER v. KIP.

[6 PAIGE CH. 68.]

JUDGMENT CREDITOR NEGLECTING TO ENFORCE HIS LIEN IN TEN YEARS after docketing his judgment, loses his legal priority over a mortgage by the debtor subsequent to such docketing.

JUDGMENT LIEN IS NOT EXTENDED BEYOND TEN YEARS by a revival of the judgment within the ten years as against a *bona fide* mortgage lien accruing after the docketing and before the revival.

OBJECT OF A SCIRE FACIAS IS NOT TO EXTEND THE LIEN of a judgment, but to enable the creditor to enforce his lien by execution.

JUDGMENT CREDITOR HAS NO LIEN FOR INTEREST upon a judgment recovered before the act of April, 1813, authorizing the collection of interest on executions on judgments thereafter recovered.

EQUITY GIVES EFFECT TO THE LIEN OF A JUDGMENT upon a legal title only as far as it can be enforced by execution at law.

INTEREST IS RECOVERABLE BEYOND THE PENALTY OF A BOND by way of damages for the detention of the debt, as against the principal debtor.

INTEREST IS RECOVERABLE ON A MORTGAGE beyond the penalty of a bond given as collateral security for the same debt, even though not recoverable in an action on the bond.

APPEAL and cross-appeal from a decree of the vice-chancellor of the first circuit distributing the proceeds of a sale of certain land under a decree for the foreclosure of a mortgage in favor of the complainants, executed by one Kip and wife in May, 1813, to secure payment of a debt of one thousand six hundred and fifty dollars, with interest, in accordance with the tenor of a certain bond given to secure the same debt in the penal sum of three thousand three hundred dollars. Kip, the mortgagor, was discharged under the insolvent act in 1816, and his interest in the premises passed to his assignee for the benefit of creditors. The mortgagor being now deceased, his widow was entitled to dower in the premises, subject to the mortgage. The principal and interest now due exceeded the penalty of the bond. One Roosevelt had a judgment against Kip recovered prior to the making of the mortgage and to the act of 1813 providing for collecting interest on judgments thereafter recovered, which judgment was revived in 1821, more than ten years before the suit for foreclosure. The premises having been sold under the decree and the proceeds brought into court, the vice-chancellor decreed that the complainants were entitled to nothing beyond the amount of the penalty of the bond and costs; that the lien of Roosevelt's judgment must be postponed to the lien of the mortgage and the widow's claim for dower, but took precedence over the claim of the assignee in insolvency, but that there was no lien for interest on the judgment. The complainants appealed from the first part of the decree, and Roosevelt from the latter part.

C. O'Connor, for the complainants.

J. J. Roosevelt, for Roosevelt, appellant.

D. S. Jones, for Kip's widow and other defendants.

WALWORTH, Chancellor. There can be no doubt as to the correctness of the vice-chancellor's decision, that the defendant Roosevelt lost his legal priority over the mortgagee by his neglect to enforce the lien of his judgment within the ten years. The opinion of Mr. Justice Sutherland in *Little v. Harvey*,¹ referred to by the vice-chancellor, 2 Edw. Ch. 169, has since

been sustained by a decision of this court, upon the point which is now under consideration: See *Pettit v. Shepherd*, 5 Paige, 493 [28 Am. Dec. 437]. The revival of the judgment by *scire facias*, within the ten years, could not have the effect to continue the lien as against *bona fide* purchasers or incumbrancers whose rights or liens had accrued after the docketing of the original judgment. The object of a *scire facias* is not to extend or continue the lien of the judgment, but to enable the plaintiff to enforce his lien by execution. Besides, in this case, it appears that more than ten years had elapsed after the revival of the judgment before the filing of the complainant's bill; so that if the *scire facias* could have had the legal effect to extend the original lien of the judgment beyond the ten years, as against the complainant's mortgage, the lien was lost by the subsequent neglect of Rosevelt to enforce that lien within the ten years after the judgment upon the *scire facias*.

The judgment never was a lien upon the land for anything more than the nominal amount thereof, without interest. The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it could be enforced by execution at law. And where interest can be levied upon the execution, the judgment creditor is entitled to a preference over subsequent liens and the general creditors of the defendant in the judgment; but he is not entitled to a lien for interest upon a judgment which does not draw interest; although he may, in a suit upon the judgment, recover interest by way of damages: *Tunstall v. Trappes*, 3 Sim. 299; *De La Vergne v. Evertson*, 1 Paige, 182 [19 Am. Dec. 411]. So much of the decree of the vice-chancellor as is appealed from by Rosevelt must be affirmed, with costs, to be paid by the appellant.

The appeal of the complainants presents the question whether a mortgagee can enforce the lien of his mortgage beyond the penalty of the bond, where the amount of principal and interest actually due exceeds that sum. This question does not appear to have been judicially settled in any of the courts of this country, except in the state of Massachusetts, and but one or two cases are to be found in the English reports where the precise question has arisen, although the books are full of conflicting decisions as to the right of the obligee in a bond, in other cases, to recover interest beyond the penalty. There appears to be a well-settled rule in the court of chancery in England, that in the taking an account of an insolvent estate, upon an ordinary creditor's bill, the master is not to allow interest be-

yond the penalty of the bond, in favor of the specialty creditors, either as against the estate of a surety, or of the principal debtor. But the question appears to be unsettled there, whether anything beyond the penalty can be recovered against the principal or the surety in an indemnity bond for the performance of covenants. From an examination, however, of all the cases on this subject, I think it may be considered as the settled law in this state, that as against the surety in a bond, the obligee can not, in an action upon such bond, recover anything more than the penalty of the bond, with interest thereon from the time when a personal demand was made upon such surety for payment. There is a technical right to recover interest upon a money bond beyond the penalty, by way of damages for the detention of the debt. If, therefore, the surety should delay the collection of the debt by an unreasonable, protracted litigation, it might be proper to direct the jury to find damages to the extent of the interest which had accrued during such unreasonable and improper delay: *Warner v. Thurlo*, 15 Mass. 154. But as a general rule, the surety can only be considered as covenanting for the payment of the penalty of the bond, if the condition thereof is not performed by the principal debtor.

Such a limitation of liability, however, is not applicable to the principal debtor in a money bond. As to him, the amount secured by the condition of the bond is the real debt, which he is both legally and equitably bound to pay; and if he neglects to pay the money when it becomes due, there is no rule of justice or of common sense which should excuse him from the payment of the whole amount of the principal and interest, whether it be more or less than the formal penalty of the bond. I think also upon examination, it will be found that there is no technical difficulty in recovering a judgment at law, upon the bond, which will be sufficient in amount to enable the plaintiff to levy the whole of the debt and interest and costs, justly due him by an execution upon such judgment. By the common law, the plaintiff, in an action upon a penal bond, is entitled to recover damages for the detention of the debt, beyond the amount of the penalty of the bond. And although the damages usually recovered in such cases are merely nominal, as the penalty of the bond is generally sufficient to cover the sum actually due with the interest thereon, yet the amount of such damages may be increased by the jury upon a trial, or added to the damages and costs upon taxation where there is a judgment by default,

whenever the justice of the case requires the judgment to be entered in that form: *Moffat v. Barnes*, 3 Cai. 49, n.; *Heldipp v. Otway*, 7 T. R. 447, n. I admit there are conflicting decisions on this subject in the English courts; but the last one which I have been able to find is in favor of allowing interest beyond the penalty of the bond, by way of damages for the detention of the debt, to the extent, if necessary, of the damages laid in the plaintiff's declaration: *Francis v. Wilson*, Ry. & M. 105. See also *Lord Lonsdale v. Church*, 2 T. R. 368. The general current of the American cases is in favor of allowing interest by way of damages, beyond the penalty; and in many cases this principle has been extended to the case of a surety: See *United States v. Arnold*, 1 Gall. 348; *Harris v. Clapp*, 1 Mass. 308 [2 Am. Dec. 27]; *Perit v. Walkis*, 2 Dall. 252; *State of Maryland v. Wayman*, 2 Gill & J. 254; *Tennant's Ex'rs v. Gray*, 5 Munf. 494.

This question appears to have been deliberately settled by the supreme court of this state, as early as 1805, in the case of *Smedes v. Hooghtaling*, 3 Cai. 48 [2 Am. Dec. 250]. Kent, C. J., there says: "On a review of all the decisions on this subject, the court think this rule ought to be adopted: that interest is recoverable beyond the penalty of the bond; but that the recovery depends upon principles of law, and is not an arbitrary *ad libitum* discretion in the jury. This case was not overruled in the subsequent case of *Clark v. Bush*, in the same court, 3 Cow. 151; although it appears to have been overlooked by the learned chief justice in his very elaborate examination of the cases on this subject, as it was not referred to by either of the counsel, and is not alluded to in his opinion. The question which the chief justice was examining, and the only one upon which any definite opinion was expressed by him in the case of *Clark v. Bush*, was, whether a surety in a mere bond of indemnity, given by him for the benefit of another person, was chargeable beyond the penalty of his bond; and the conclusion at which he arrived in that case, was unquestionably correct. That decision, therefore, did not conflict in any manner with the former decision of the court, that the principal debtor in a money bond may be charged with the money which is actually due, with interest thereon from the time it became due, although the amount of such debt and interest may exceed the nominal amount of the penalty of the bond.

Even if I am wrong in the conclusion at which I have arrived in this case, that the whole amount of the principal and interest

due to the complainants could have been recovered in an action of debt upon the bond of the mortgagor, still it appears to be perfectly well settled, even in England, that interest may be recovered by the mortgagee, upon his mortgage, beyond the penalty of a bond given as collateral security for the payment of the same debt; and that too as against a surety. This was so held by Sir William Grant, the master of the rolls, in the case of *Clarke v. Lord Abingdon*, 17 Ves. 106, and the same principle had long before been settled by a decision of the house of lords upon an appeal from the court of chancery in Ireland: *Kirwane v. Blake*, 4 Bro. P. C., Tom. ed., 532. See also *Pills v. Tilden*, 2 Mass. 118. The case of *Lloyd v. Hatchett*, 2 Anst. 525, referred to upon the argument and in the opinion of the vice-chancellor, appears to have been entirely mistaken; and when rightly understood, it does not appear to conflict with the decisions of Sir William Grant and of the house of lords, in the cases to which I have referred. The bond, in that case, upon which the court refused to allow interest beyond the penalty, does not appear to have been a bond for the payment of the same debt for which the mortgage was given. The mortgagor had assigned the equity of redemption to the complainants, for the use of his creditors at large, and the bill was filed against the mortgagee in possession, to redeem; and it appears that the latter must have set up a claim for an additional debt, due upon a bond given about the same time with the mortgage, and claimed to be allowed the amount thereof, either as one of the general creditors, or as an offset against the rents and profits which he had received during the thirty-three years in which he had been in possession of the mortgaged premises. In the present case, the condition of the mortgage is not to pay the penalty of the bond; but it is in terms to pay the one thousand six hundred and fifty dollars mentioned in the condition of the bond, at the time and in the manner mentioned in such condition. The mortgage, therefore, is to secure the payment of a specific sum of money, with the interest thereon, without any reference to the amount of the penalty of the bond, which was given to secure the same debt.

Both upon principle and upon authority, therefore, the mortgagees are entitled to the full amount of their debt secured by the mortgage, with the legal interest thereon; and so much of the decree of the vice-chancellor as is appealed from by the complainants must be reversed, with costs; which costs must be paid out of the fund raised by the sale of the mortgaged

premises, in preference to the payment of the allowance to the widow for her dower, and to the amount due to the defendant Roosevelt, on his judgment.

JUDGMENT LIEN AFTER REVIVAL of the judgment can only operate prospectively, and so as not to overreach any antecedent alienation or incumbrance: *Coombs v. Jordan*, 22 Am. Dec. 236. *Scire facias* against an administrator of a deceased debtor operates only to enforce a lien previously established and fixed upon the property of the deceased, and where there is no such lien the *scire facias* is powerless, as where final judgment was entered after the death of the judgment-debtor: *Carter v. Carriger's Adm'r's*, 24 Id. 535. The cases in this series relating to judgment liens generally are collected in the notes to *Jones v. Jones*, 18 Id. 343, and *Coombs v. Jordan*, 22 Id. 279. See also *Sandford v. McLane*, 23 Id. 773; *Commonwealth v. Baldwin*, 26 Id. 33, and *Pettit v. Shepherd*, 28 Id. 437, and cases cited in the note thereto.

EQUITY GIVES EFFECT TO A JUDGMENT LIEN upon a legal title only so far as it can be enforced by execution. To this point the principal case is cited in *Buchan v. Sumner*, 2 Barb. Ch. 195; *Sears v. Mack's Assignees*, 2 Brad. 412; *Meech v. Allen*, 17 N. Y. 302.

INTEREST ON JUDGMENTS AND LIEN THEREFOR.—See on this point, *Shaller v. Brand*, 6 Am. Dec. 482; *Sims v. Campbell*, 16 Id. 595, and *De La Vergne v. Everton*, 19 Id. 411.

INTEREST BEYOND PENALTY OF BOND.—In an action of debt upon a judgment for the amount of the penalty in a bond, the plaintiff may recover interest by way of damages beyond the penalty of the bond upon which the judgment was founded: *Smith v. Vanderhoof*, 10 Am. Dec. 674. Generally as to the recovery of damages beyond the penalty of a contract, see *Graham v. Bickham*, 1 Id. 328, and the note thereto, in which the subject is discussed at length. To the point that interest is recoverable on a money bond, by way of damages, beyond the penalty of the bond, the principal case is cited as an authority in *Lyon v. Hall*, 1 E. D. Smith, 252; 8 C., in court of appeals, 8 N. Y. 153; *Griffiths v. Hardenbergh*, 41 Id. 471. So in *Brainard v. Jones*, 18 Id. 35, it was held, though not citing *Mower v. Kip*, that a recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. Mr. Justice Willard, in *Lyon v. Clark*, 8 N. Y. 153, says, that "the apparent conflict in the cases on the question, whether a plaintiff can recover in debt on a penal bond a sum beyond the penalty, grows out of confounding actions on bonds for the performance of covenants, properly so called, with actions on bonds for the recovery of money only. In the former case the recovery is in general, if not always, limited by the penalty, and in the latter it is not." In *Fraser v. Little*, 13 Mich. 195, it was decided that in an action against the sureties in a replevin bond, there could be no recovery beyond the penalty of the bond and costs. Campbell, J., who delivered a separate opinion, said: "Where a debt is secured as such by other securities besides a bond, the fact that a bond has been taken will not usually affect the remedy on other obligations. But there is no authority for allowing any recovery or account beyond the penalty, when the bond becomes material. The only cases where a different result has been reached, are where the bond debtor has resorted to equity to obtain relief from legal proceedings; and then it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to the jurisdiction

of equity, to do what was just under the circumstances, and not to reap advantage from a delay which he has caused his adversary to undergo." After referring to a number of other cases, he continues: "In *Mower v. Kip*, 6 Paige, 91, the case was the same as in *Clarke v. Lord Abingdon*, 17 Ves. 106, and the decree was manifestly correct, because the mortgage was conditioned to secure the debt, and not the penalty. If designed to go further, the case is not sustained by the authorities."

LAW OF INTEREST GENERALLY.—See a full discussion of this subject in the note to *Selleck v. French*, 6 Am. Dec. 188.

THE ATTORNEY-GENERAL v. THE COHOES Co.

[6 PAIGE CH. 133.]

DISSOLUTION OF AN INJUNCTION IS NOT AUTHORIZED by a mere denial on information and belief, where the injunction is sustained by the allegations in the bill.

COURT OF CHANCERY HAS JURISDICTION TO RESTRAIN any purpresture or unauthorized appropriation of public property to private uses, which may amount to a public nuisance, or injuriously affect the public interests.

COURT MAY RESTRAIN INTERFERENCE WITH A PUBLIC CANAL by cutting through the embankment and taking water therefrom for private manufacturing purposes, at the suit of the attorney-general upon an information filed by the superintendent of the canal upon oath, to the effect that he believes the intended incroachment will injure public navigation, notwithstanding an opinion of the defendant, supported by his oath, that no public injury will ensue.

INJUNCTION to restrain a purpresture or unauthorized appropriation of the waters and embankment of the Erie and Champlain canals. The injunction was granted on the sworn information of the superintendent of that part of the canals, to the effect that the defendants had entered upon and were proceeding to cut through the embankment of the canal, which was necessary to maintain a proper elevation of water therein, for the avowed purpose of obtaining a supply of water for their mills, and that the canals might thereby be deprived of the necessary quantity of water and the navigation thereof impeded. The answer, sworn to by the defendant's agent, admitted that they were proceeding to cut through the embankment, etc., but denied that the navigation of the canals would be interrupted thereby, etc. The defendants now moved to dissolve the injunction.

S. Beardsley, attorney-general.

J. A. Spencer, for the defendants.

WALWORTH, Chancellor. The fact is not denied by the answer, that the embankment in question is a part of the Erie and Champlain canals, and as such belongs to the people of the state. The question is not properly presented in this stage of the suit, whether the several matters set up in the answer by way of avoidance, form any defense to the suit. The matters thus set up are not strictly responsive to the information; and even if they were they are not sworn to in such a manner as to authorize a dissolution of the injunction thereon, without further proof, or until the attorney-general has had an opportunity to introduce proofs on the part of the state. A mere denial upon information and belief is not sufficient to authorize a dissolution of an injunction, which is sustained by the allegations in the bill: 2 Robin. Pr. 243, and cases there referred to. The answer in this case is sworn to by the agent of the company, who swears to his belief merely, but does not pretend that he has any knowledge as to these matters. The decision of the questions arising upon this part of the answer must be postponed until the hearing, when all the facts will be properly before the court by the testimony in the suit.

As the case now stands, it would not be proper to permit the defendants to proceed and make an opening in the canal embankment, for the purpose of taking any part of the water therefrom, without the consent, and contrary to the wishes of those officers of the state; who have, by law, been specially intrusted and charged with the duty of protecting and preserving these canals, and the uninterrupted use thereof, for the public. This court has jurisdiction to restrain any purpresture or unauthorized appropriation of the public property to private uses, which may amount to a public nuisance, or may injuriously affect or endanger the public interest. And where the officers intrusted with the protection of such public interests, acting under the sanction of their official oaths, believe the intended encroachment will prove injurious to the navigation of the canals, private persons should not be permitted to interfere with the waters or embankments of the canals, contrary to law, upon a mere opinion, although under the sanction of an oath, that the intended trespass upon the public rights would not be an injury to the public. Lord Eldon proceeded on this principle in refusing to dissolve an injunction restraining a purpresture in the Thames river, by Earl Grosvenor and others, although there were affidavits on the part of the defendants, that the public would not be injured by the intended encroachment; the

proper officer of the crown having examined the case, and expressed his opinion, that the relator was entitled to the assistance of the attorney-general in preventing such encroachment: *The Attorney-general v. Johnson et al.*, 2 Wils. Ch. 87.

The injunction in this case must therefore be retained until the hearing.

INJUNCTION AGAINST TRESPASS OR NUISANCE: See the note to *Jerome v. Ross*, 11 Am. Dec. 498; see also *Society v. Morris et. Co.*, 21 Id. 41; and *Hart v. Mayor of Albany*, 24 Id. 165, and notes thereto, citing other decisions in this series on the same point. To the point that an injunction will lie on the application of the attorney-general, or of the state in its own name, or at the suit of a private individual who is specially injured and can not well be compensated in damages, to restrain an appropriation of a public highway which will constitute a nuisance, the principal case is cited in *Davis v. Mayor et. of New York*, 14 N. Y. 526. Slight or occasional interruptions of the use of a highway or navigable stream, which are temporary and reasonable, do not come within the rule: *People v. Horton*, 64 Id. 610, in which the principal case is referred to as being one of a permanent obstruction of the use of the canal. It is cited also as to the jurisdiction of equity upon the information of the attorney-general to restrain public injuries, in *Attorney-general v. Railroad Companies*, 35 Wis. 536, 540, 593; see also similar citations of the case in *Commonwealth v. Pittsburgh et. R. R. Co.*, 24 Pa. St. 160; *Hunter's appeal*, 40 Id. 198; *People v. Low*, 34 Barb. 507; S. C., 22 How. Pr. 121; *People v. Mayor et. of New York*, 27 Id. 36; *People v. Tweed*, 13 Abb. Pr. (N. S.) 82.

DISSOLUTION OF INJUNCTION IS AUTHORIZED BY AN ANSWER denying the facts upon which the plaintiff's equity rests: *Gibson v. Tilton*, 17 Am. Dec. 306. But a denial of the plaintiff's title in an answer to a bill for an injunction against waste will not warrant the dissolution of an injunction against waste pending the suit: *Duwall v. Waters*, 18 Id. 350.

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8. CHARITABLE BEQUESTS ARE TO BE LIBERALLY CONSTRUED to carry into effect the intention of the testator; and where the intent can be discovered, chancery will carry it into execution. *Id.*
9. CHANCERY WILL NOT SUFFER AN EQUITABLE INTEREST to fail for want of a trustee to support it. *Id.*
10. THAT A CHARITABLE USE IS GENERAL, and in some measure indefinite, is no objection, unless there is an uncertainty as to the amount, or the general purpose is so uncertain and indefinite that it can not be executed. A bequest to the respective treasurers, "for the time being," of the American bible society, and of other unincorporated societies, was sustained. *Id.*

11. **PERPETUITY, WHAT IS NOT.**—A devise of money to be kept at interest, and the interest to be applied to a particular charitable purpose, does not create a perpetuity repugnant to the common law. *Moore v. Moore*, 417.
12. **MORTMAIN ACTS** of England were never recognized as the law of Kentucky and Virginia. *Id.*
13. **DEVISES TO CORPORATIONS ARE NOT FORBIDDEN** by the Kentucky statute of wills. *Id.*
14. **COURT OF EQUITY MAY ENFORCE A TRUST** independently of the statute of 43 Eliz. if it is defined by the donor so as to enable the court to ascertain and apply it according to legal rules. *Id.*
15. **BEQUEST FOR CHARITABLE PURPOSE.**—Where a testator empowers his executors to sell his estate and directs a certain portion of it to be converted into a fund "for educating some poor orphans" of a particular county, "to be selected by the county court, who are the guardians of such, and to be confined to such as are not able to educate themselves," such fund to be loaned out at interest and rendered "a perpetual fund" and the interest only so applied, the trust thereby created is sufficiently certain for judicial recognition and enforcement, independently of the statute of 43 Eliz. *Id.*
16. **IF THERE IS NOT SUFFICIENT CERTAINTY AS TO THE BENEFICIARIES** in such a case to enable a court of equity to enforce the execution of the power, the court will at least not interpose, on the application of the heirs to prevent its execution. *Id.*
17. **STATUTE OF 43 ELIZ. IS IN FORCE IN KENTUCKY** so far as it operates to give validity to charitable gifts not otherwise valid, and cures such bequest for the education of the poor orphans of a county, if it should be deemed defective by the common law. *Id.*
18. **OBJECTS OF THE STATUTE OF 43 ELIZ.** discussed. *Id.*
19. **COURT OF EQUITY HAS JURISDICTION UNDER THAT STATUTE** to enforce the trust created by a bequest for the education of the poor orphans of a particular county, made valid by the statute, and if not, it would not interfere against the beneficiaries. *Id.*
20. **STATUTE OF 43 ELIZ. IS IN FORCE IN MASSACHUSETTS**, so far as to determine what gifts are to charitable uses. *Sanderson v. White*, 591.
21. **GIFTS TO CHARITABLE USES ARE HIGHLY FAVORED** in law, and where a literal execution is impracticable or inexpedient in whole or in part, they will be carried into effect so as to accomplish the general purpose of the donors, so far as that purpose can be ascertained and as nearly as circumstances will permit. *Id.*
22. **HEIRS OF THE DONOR CAN NOT, BECAUSE OF NEGLIGENCE**, misapplication of funds, or other breach of trust, in such cases, call upon a court of equity to declare a resulting trust in favor of themselves, and no beneficial interest accrues to them from a non-execution of the trust. *Id.*
23. **TRUSTEES OF A CHARITABLE BEQUEST MAY BECOME INCORPORATED**, though the will does not expressly provide for their incorporation, where the object of the gift is in its nature lasting, and it is obviously in accord with the testator's intention that there should be perpetual succession. *Id.*
24. **HEIRS OF THE FOUNDER OF AN ELEEMOSYNARY CORPORATION** have no visitatorial power where the trustees are not themselves objects of the donor's charity and are vested by the founder with a general control,

superintendence, and management of the trust, which in effect gives them the power of visitors; as where a sum of money is bequeathed to certain trustees and their successors, who afterwards become incorporated, in trust, to invest the same in such secure manner as they shall think best, and to apply the income to the pay or maintenance of a faithful and competent instructor in a certain school to be established by them, for pious and indigent youth, and authorizing the trustees and their successors "to make from time to time such rules and regulations as they may believe best adapted to insure success." *Id.*

25. BILL BY THE HEIRS IN SUCH A CASE TO COMPEL THE TRUSTEES to a discovery as to their investments, and to an execution of the trust, will not lie. *Id.*

COMMON CARRIERS.

1. THE MASTER AND OWNERS OF A STEAMBOAT are not liable for the theft of a package of money brought on board by a passenger and retained by him within his personal custody, no compensation for the carriage of the package being paid. *Wilcos v. Steamboat Philadelphia*, 436.
2. THE CLERK OF A STEAMBOAT has not authority, by receiving from a passenger a package of money brought on board by the latter, for safe keeping, to bind the master and owners. The contract in such case is merely one between clerk and passenger. *Id.*

CONSIDERATION.

See COVENANTS IN DEED.

CONSTITUTIONAL LAW.

1. STOCKHOLDERS UNDER AN ORIGINAL CHARTER can not be ousted of their rights by a subsequent legislative act amending the charter. *Boisdere v. Citizens' Bank*, 453.
2. THE PRESIDENT AND DIRECTORS OF A BANK can not accept an amended charter, the result whereof would be to deprive stockholders in the institution of their rights as such; as where, after free colored persons had become stockholders under an original charter, a subsequent charter was granted, in which the right of holding stock is confined to free white citizens. *Id.*
3. SUPREME COURT HAS POWER TO DETERMINE whether or not amendments to the state constitution have been legally proposed and ratified by the legislature, in the manner prescribed by the constitution. *State v. McBride*, 636.
4. WORD "HOUSE," AS APPLIED TO A BRANCH OF THE LEGISLATURE, means a number of members sufficient to constitute a quorum to do business; and an amendment to the constitution, ratified by two thirds of a majority of all the members elected, is ratified by two thirds of that house. *Id.*
5. AMENDMENT VACATING OFFICES OF JUDGES of the circuit courts of this state, is an independent amendment, and is capable of standing alone. *Id.*

CONTRACTS.

1. ONE WHO CALLS IN A PHYSICIAN to attend a female who was brought up in his house, but whose time was her own on arriving at age, is originally
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liable to pay for the attendance, especially where other circumstances combine to show that the defendant expected to pay. *Clark v. Waterman*, 150.

2. IN CONSTRUING A CONTRACT to deliver a specified quantity of corn and fodder "as early next fall as the same will be dry enough to house, unavoidable accidents only excepted," the failure of crops, arising from drought, will not be deemed an accident excusing the non-performance of the contract. *McGehee v. Hill*, 277.
3. PART PERFORMANCE OF AN ENTIRE CONTRACT need not be accepted. *Id.*
4. VENDEE MUST SHOW THAT HE WAS READY TO PAY according to the stipulations of his contract of purchase, before he can sustain an action against the vendor for non-performance, and this is true whether the vendor was ready and able to perform or not. *Id.*
5. THE COMPROMISE OF A DOUBTFUL CLAIM is sufficient consideration for a contract. *Peirce v. New Orleans Building Co.*, 448.
6. PARTY FOR WHOM SERVICES ARE TO BE PERFORMED under a contract is not bound to pay for them until they are rendered. *Pa. etc. New Co. v. Dandridge*, 543.
7. COVENANT NEVER TO SUE ONE OF TWO JOINT AND SEVERAL PROMISORS in a note does not, like a release to one, discharge the other obligor. *Goodnow v. Smith*, 600.
8. SUCH A COVENANT IS A GOOD DEFENSE to the covenantee in an action against both promisors on the note, but the plaintiff, under stat. 1834, c. 189, is entitled to judgment against the other promisor. *Id.*
9. PAYMENT OF HALF THE NOTE BEFORE DUE, and taking at par the note of a third person indorsed by the plaintiff without recourse, for a small sum, constitute a sufficient consideration for such a covenant. *Id.*
10. COMPOUNDING A MISDEMEANOR is an illegal consideration for a note, and avoids it. *Jones v. Rice*, 612.

See AGENCY.

CONTRIBUTION.

See EQUITY, 2.

CORPORATIONS.

1. THAT PLAINTIFF IS A CORPORATION NEED NOT BE ALLEGED when it sues in its corporate name. *Harris v. Muskingum Mfg. Co.*, 372.
2. ONE MEMBER of an incorporated company can not release a debt due it. *Id.*
3. PLEA THAT A CORPORATION HAS BEEN DISSOLVED by the acts of its members, is insufficient, without showing what those acts were. *Id.*
4. CORPORATIONS UNDER THE CODE are declared to be intellectual beings, different and distinct from the persons who compose them, with rights and estates beyond the control of the individual corporators. *Peirce v. New Orleans Building Co.*, 448.
5. CONTRACT CAN NOT BE BINDING on a corporation unless binding on every member thereof. *Id.*
6. ACT OF MAJORITY of corporators does not bind minority, if it has not been expressed in the form pointed out by law. *Id.*
7. *IDEM.*—ACT OF STOCKHOLDERS AT A MEETING, wherein only a minority of

the stock was represented, is void, and can not be ratified by the subsequent assent of the holders of a majority of the stock, if this assent be given elsewhere than at a meeting of the stockholders. *Id.*

8. ACT OF MAJORITY OF STOCKHOLDERS EXPRESSED ELSEWHERE than at a meeting of stockholders, as where the assent of each one is given separately and at different times, is not binding on the corporation. *Id.*
9. WHETHER A DUTY IMPOSED BY LAW on a corporation is directory or essential to the enjoyment of some of their rights, must be determined by its nature and object, by the public convenience, and by the legislative intention. *Middle Bridge Prop'rs v. Brooks*, 510.
10. REGULATION THAT A TOLL-ROAD COMPANY should keep the rates of toll constantly exposed to view, is mandatory; and if not complied with, deprives the company of the benefit of the penalty for passing without paying toll. *Id.*
11. COMPANY WHOSE CHARTER LIMITS IT to the pursuit of particular objects therein specified, can not contract, nor empower its agent to contract, in reference to objects differing essentially from those so specified in the charter. *Pa. etc. Nav. Co. v. Dandridge*, 543.

See AGENCY, 2, 3; CHARITABLE USES: CONSTITUTIONAL LAW, 1, 2; MUNICIPAL CORPORATIONS.

COSTS.

COSTS AGAINST SURETIES of the claimant of property can not be awarded in a proceeding to try the rights of property. *Hooper v. Pair*, 258.

CO-TENANCY.

1. A TENANT IN COMMON OF THE FEE is liable to an account for waste, if he cuts timber and clears woodland on the estate to an extent beyond that of his interest in the fee. *Johnson v. Johnson*, 72.
2. A TENANT IN COMMON OF A MILL can not bring trespass against his co-tenant, on the ground that the latter entered into the exclusive occupancy of the mill. *Porter v. Hooper*, 480.
3. TRESPASS FOR THE MEANE PROFITS by a tenant in common can not be maintained without an actual ouster. *Id.*
4. FOR DESTROYING THE COMMON PROPERTY, trespass lies by one co-tenant against another. *Herrin v. Eaton*, 499.
5. TRESPASS QUARE CLAUSUM WILL NOT LIE by a tenant in common of land against his co-tenant. *Duncan v. Sylvester*, 512.

COVENANTS IN DEEDS.

1. CONSIDERATION OF NATURAL AFFECTION will support a covenant of warranty in a deed by way of advancement, from a grandfather to the husband of his granddaughter, and an action may be maintained for a breach of such warranty. *Hanson v. Buckner*, 401.
2. VALUABLE CONSIDERATION expressed in such a deed, with interest, is, it seems, the measure of damages for a breach of such warranty. *Id.*
3. VOLUNTARY CONVEYANCE TO A CHILD or grandchild of the grantor, he being indebted at the time, is fraudulent in law as to such pre-existing debts, without regard to the amount of the debts or of the property con-

veyed, or to the grantor's circumstances or intentions in making the conveyance. *Id.*

4. EVICTION, TO CONSTITUTE A BREACH of a covenant of warranty, is sufficiently proved by showing a sale of the land under a decree against the grantor, a confirmation of the report of sale by the court, and a yielding up of possession, and purchase of the title by the warrantee, without an actual removal. *Id.*

CRIMINAL LAW.

THROWING A CARCASS INTO A WELL, thereby corrupting the water, is an indictable offense at common law. *State v. Buckman*, 646.

See INDICTMENT.

DAMAGES.

See COVENANTS IN DEEDS, 2; LANDLORD AND TENANT, 7; SLANDER, 8.

DEEDS.

1. THE ADMISSION OF THE RECEIPT OF A CONSIDERATION, expressed in a deed, can not be contradicted, in the absence of circumstances of fraud; but considerations, in addition to that expressed, may be proved. *Gist v. Davis*, 89.
2. LEAST CERTAINTY IN DESCRIPTION in deed must yield to greater certainty. *Benedict v. Gaylord*, 299.
3. DESCRIPTION OF LANDS as being bounded by certain specified proprietors must yield to another description in the same deed by known, visible, permanent, and well-ascertained monuments, and courses and distances, because the latter description is more certain than the former. *Id.*
4. LANDS BOUNDED BY A POND extend to the margin of the water as existing when the conveyance was made, whether raised by a dam or lowered by widening the outlet of the pond. *Bradley v. Rice*, 501.
5. TO, FROM, OR BY are words of exclusion unless by necessary implication they are manifestly used in a different sense. *Id.*
6. RECEIPT IN DEED IS NOT CONCLUSIVE; and where a question is raised as to the payment, parol evidence may be admitted to show by whom it was made. *Depeyster v. Gould*, 723.

DEPOSITIONS.

See EVIDENCE, 10, 16.

DETINUE.

1. DETINUE CAN NEVER LIE AGAINST ONE who was never in possession of the property sued for. *Allen v. Harlan*, 205.
2. DETINUE AGAINST AN EXECUTOR for property destroyed or converted by his testator, or in the possession of a co-executor, can not be sustained. *Id.*
3. DETINUE FOR PROPERTY IN THE POSSESSION OF AN EXECUTOR, although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate. *Id.*
4. AN ACTION OF DETINUE MAY BE REVIVED against the executor of the defendant on the death of the latter; but the *scire facias* must, in such

case, suggest that the property has come to the possession of the executor. If this suggestion proves true, judgment will go against the executor personally for the property or its value, and *de bonis testatoris* for the damages from the date of the detention by the testator to the return of the verdict. *Id.*

DEVISES.

See WILLS.

DIVORCE.

1. **DIVORCE WILL BE DENIED** where the conduct alleged as ground therefor was provoked by the actions of the libellant. *Poor v. Poor*, 664.
2. **EXTREME CRUELTY** is not austerity of temper, petulance of manners, rudeness, lack of attention, or sallies of temper, if there be no threat of bodily harm. *Id.*
3. **ANY WILLFUL MISCONDUCT OF THE HUSBAND** which endangers the life or the health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty. *Id.*
4. **IDEM.—MANY ACTS ARE NOT NECESSARY** to constitute such cruelty; whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe. *Id.*
5. **THE CRUELTY LAYING A LEGAL FOUNDATION** for a divorce must be unmerited and unprovoked. *Id.*

DOWER.

1. **THE WIFE CAN NOT BE ENDOWED**, in the estate held by her husband, as trustee. *Thompson v. Murray*, 68.
2. **GENERAL REPUTATION, COHABITATION, and acknowledgment** are sufficient evidence of marriage in all cases except in actions for criminal conversation, and in prosecutions for bigamy, and are, therefore, sufficient in cases of dower. *Sellman v. Bowen*, 524.
3. **COURT OF EQUITY IS THE ONLY FORUM** in which widow can recover from the alienee of her husband damages for the detention of her dower. *Id.*
4. **RECOVERY AT LAW, BY WIDOW, of dower, does not preclude her from afterwards recovering the rents and profits in equity.** *Id.*
5. **STATUTE OF LIMITATIONS DOES NOT BAR WIDOW'S RIGHT OF DOWER**, and can not therefore bar her right to recover the rents and profits, although the latter are sought in a separate suit. *Id.*
6. **RENTS AND PROFITS ARE DECREED**, in such case, from the time of demand made, and are estimated according to the improved value of the premises from the time the improvements were made. *Id.*
7. **ELECTION OF WIDOW TO ACCEPT LEGACY IN LIEU OF DOWER, WHAT CONSTITUTES.**—To constitute an election by a widow to accept a legacy bequeathed to her in lieu of dower, there must be some decisive act on her part, with knowledge of her situation and rights, or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons. *English v. English*, 730.
8. **SIGNING APPLICATION TO LEGISLATURE FOR SALE of the real estate, to enable the executors to carry out the testator's intentions, is not suffi-**

cient evidence of an election in law, where such application was never presented to the legislature or acted upon; nor is the filing of an answer to a bill in chancery, assenting to a decree for the sale of such real estate to carry into effect the trusts of the will, one of which was the payment of the annuity bequeathed in lieu of dower, where the widow who so signed was merely quiescent in the matter. *Id.*

DURESS.

MONEY PAID UNDER A MORAL COMPULSION to obtain property improperly detained is not a voluntary payment. Nor is the principle affected by the fact that the payment was made pursuant to a written promise. *Chamberlain v. Reed*, 506.

EASEMENTS AND SERVITUDES.

1. **UNGRANTED RESIDUE OF A RIGHT OF WAY** may be annexed to a particular messuage or close, either by express stipulation or necessary implication, according to the occasion of the grant. *Kirkham v. Sharp*, 57.
2. **GRANTOR OF SUCH RIGHT OF WAY**, by conveying full privilege of ingress, egress, and regress, puts his right thereto exactly on a footing with that of his grantee as a co-tenant; and therefore he can not afterwards use his ungranted residue in a manner different from that contemplated and obviously intended by the parties at the time the grant was made. *Id.*

See **WATER-COURSES**, 4, 5, 6.

EJECTMENT.

PREVIOUS DEMAND OF POSSESSION, WHEN NECESSARY IN EJECTMENT.—

Where one of the defendants in an action of ejectment entered under an agreement to purchase, and while in possession leased a part of the premises to the other defendant, the vendor can not oust either of them, without a previous demand of the possession; and service of a declaration in ejectment is not equivalent to such a demand. *Den v. Westbrook*, 692.

ELECTION.

See **DOWER**, 7; **WILLS**, 2, 3.

EQUITY.

1. **A DEFECTIVE CONVEYANCE** will, in equity, be executed as an agreement for a conveyance, in order to effectuate the intention of the parties; therefore, a conveyance by an agent nugatory because professing to pass the title from himself, will, where there was ample authority in the agent to bind his principal, had the conveyance been in proper form, be executed in equity as an agreement of the principal. *Welsh v. Usher*, 63.
2. **CONTRIBUTION AMONG DONEES**, for the discharge by one of a burden incident to the entire property of their common donor, will not be enforced where the donor retained, after the gift, sufficient property to satisfy the burden, and to which it might have been remitted by proper proceedings; therefore one of several donees, who has had the property given him seized under execution issued against his donor, and thereupon sold, is not entitled to contribution, where the donor had property

- ample to discharge the execution, and to which the execution creditor might have been compelled to resort. *Thompson v. Murray*, 68.
2. A BILL OF REVIVOR IS NOT ALWAYS NECESSARY where the execution of a former decree is sought; that relief will be allowed upon a bill, not one of revivor, where the bill, besides the former decree, introduces much other new matter. *Johnson v. Johnson*, 72.
 3. BILL DOES NOT LIE TO CORRECT A MISTAKE in a decree whereby a larger sum is given than the court intended, the party aggrieved having an adequate remedy by a direct application to the court, or by appeal, or certiorari. *King v. Vaughan*, 104.
 4. WHERE COMPLAINANT'S WANT OF EQUITY APPEARS on the face of the bill, no relief will be granted though the defendant answers instead of demurring. *Collins v. Jones*, 216.
 5. COURT OF EQUITY WILL NOT ASSUME JURISDICTION OVER A CONTRACT merely because it relates to good-will; and a bill claiming damages for the violation of such a contract, when ample and appropriate redress can be found in a court of law, will not be sustained by this court. *Zeigler v. Sentner*, 534.
 6. SUPPLEMENTAL BILL, WHEN ADDITIONAL RELIEF MAY BE SOUGHT BY.—Where a bill is filed by a mortgagor against the mortgagee, before the mortgage is due, for an injunction to stay waste, the complainant may, after it has become due, file his supplemental bill to have the equity of redemption foreclosed, and the mortgaged premises sold. *Allen v. Taylor*, 721.
 7. MERELY FORMAL PARTY TO ORIGINAL BILL need not be made a party to the supplemental bill, where the new matter charged therein does not affect his rights. *Id.*
 8. LEAVE OF COURT SHOULD BE OBTAINED to file supplemental bill; but where no objection is taken on this ground, it will be considered as waived by the voluntary appearance of the defendant. *Id.*
- See CHARITABLE USES; LOST INSTRUMENTS; MISTAKE; SPECIFIC PERFORMANCE.

ESCHEAT.

1. INFORMATION FOR AN INTRUSION is a remedy for trespass on the lands of the commonwealth, and can never be maintained unless the state or the king has once had the possession. *Commonwealth v. Hite*, 226.
2. THE KING OR THE STATE CAN ACQUIRE POSSESSION of escheated lands only by some matter of record. *Id.*
3. INQUESTS OF OFFICE were devised to afford authentic evidence of the rights of the king where they are based upon matters *in pais*, but if there be any one in possession of escheated lands, the king, even after office found, is not in possession till seizure by his officer. *Id.*
4. IT IS A GOOD DEFENSE TO AN INFORMATION FOR AN INTRUSION that the possession was not in the king by inquest of office because there was an adverse possession held by another. *Id.*
5. INQUISITIONS BECAME RECORDS only when duly returned. Before such return the title of the crown was incomplete. *Id.*
6. INQUISITIONS MUST BE RETURNED TO A COURT OF RECORD, where they can be contested by traverse, or *monstrans de droit*, or petition of right, and if such return is not shown, the inquisition can not be given effect. *Id.*

7. **POSSESSION, WITHOUT PRETENSE OF TITLE, is not sufficient to avoid an inquisition. *Id.***

ESTOPPEL.

1. **ESTOPPEL IS DEEMED WAIVED, IF NOT PLEADED, or taken advantage of by objection to the testimony which it would operate to exclude, where that course is proper. *Hanson v. Buckner*, 401.**
2. **GRANTEE IS NOT ESTOPPED FROM SHOWING that the deed was voluntary under which he claims, although a valuable consideration is expressed therein, where by reason of its being voluntary the land is decreed to be sold to pay a pre-existing debt of the grantor, and an action is brought on a warranty contained in the deed against the grantor's executor and devisees, the estoppel being discharged by the grantor's default in not paying the debt. *Id.***

EVIDENCE.

1. **THE PRINCIPAL IS A COMPETENT WITNESS FOR THE SURETY to prove an agreement by which the liability of the latter is discharged. *Steele v. Boyd*, 218.**
2. **PARTY TO A SUIT IS A COMPETENT WITNESS to prove diligent search for, and loss of a will, deed, or other paper, for the purpose of authorizing the reception of secondary evidence. *Apperson v. Cottrell*, 239.**
3. **PAROL EVIDENCE IS ADMISSIBLE TO VARY the *prima facie* effect of an indorsement in blank, by showing an oral agreement made by the parties at the time of the indorsement; and such agreement, when shown, will be treated as though written over the indorser's signature. *Perkins v. Callin*, 282.**
4. **PAROL EVIDENCE NOT ADMISSIBLE to control the legal effect of a deed, nor to show that a description which the law will disregard ought to prevail. *Benedict v. Gaylord*, 290.**
5. **WHERE THERE IS AN ERASURE or alteration in an instrument under which a party claims title, against his interest, the law does not presume that it was improperly made, so as to throw upon him the burden of accounting for it. *Bailey v. Taylor*, 321.**
6. **JURY MUST DETERMINE in such case, from all the circumstances, whether the erasure or alteration was made before or after the execution of the instrument; and if after, whether it was with the assent of the adverse party; and consequently, whether it rendered the instrument invalid or not. *Id.***
7. **APPARENT VARIANCE between an instrument introduced in evidence from the one set out in a pleading, is obviated by the failure of plaintiff to object to its introduction, such failure being deemed a confession that the instrument in evidence is relevant to the issue. *Leidig v. Rawson*, 354.**
8. **A VARIANCE BETWEEN AN INSTRUMENT offered in evidence from that set forth in the pleadings, where this latter is not of the foundation of the action, is immaterial, unless it be of such character as to cause a strong probability that the two instruments are not identical. *Id.***
9. **A DEMURRER TO EVIDENCE admits the facts which that evidence, if admitted, would tend to prove, together with such inferences as may be reasonably drawn from such facts. *Doe v. Rur*, 368.**
10. **RECORD OF A SUIT INCLUDES THE DEPOSITIONS, exhibits, and papers used on the trial as well as the pleadings and decree, and where such record**

- is offered in evidence in another suit, and the exhibits, proofs, and depositions therein are read without objection, all objections thereto are deemed waived in an appellate court. *Hanson v. Buckner*, 401.
11. A WITNESS TESTIFYING AS AN EXPERT may refer to his testimony on a former trial, for the purpose of reviving his recollection of the facts of the case. *Riordan v. Davis*, 442.
 12. A WITNESS TESTIFYING AS TO FACTS whereof he had made a memorandum at the time of their recurrence, may refer thereto for the purpose of refreshing his memory. *Id.*
 13. WHERE NO OBJECTION HAS BEEN RAISED to the nature of the evidence, introduced in proof of a fact on the trial, the objection is waived; therefore, if a fact be proved by parol, though the proper evidence should have been by writing, if the objection be not raised on the trial, it can not be on appeal. *Marlatt v. Levee Steam Cotton Press Co.*, 468.
 14. RECORDS OF A POST-OFFICE ARE ADMISSIBLE to show the transactions of the office, but are not conclusive. *Merriam v. Mitchell*, 514.
 15. ALL SURROUNDING FACTS of a transaction should be admitted in evidence, if they can be established by competent means, and afford any fair presumption or inference as to the question in dispute. *Pa. etc. Nav. Co. v. Dandridge*, 543.
 16. DEPOSITIONS TAKEN ABROAD, in the absence of an attorney for the adverse party, and returned and filed and placed in the hands of such party's attorney of record more than a year before the trial, and not objected to until then, are admissible, the objection being deemed waived by the delay in making it. *Farrow v. Com. Ins. Co.*, 564.
 17. EVIDENCE OF WHAT A DECEASED WITNESS TESTIFIED on a former trial of the same cause is admissible in a criminal case against the defendant, and this is no infringement of the constitutional requirement that the accused shall be confronted with the witnesses against him. *Commonwealth v. Richards*, 608.
 18. DECEASED WITNESS' WHOLE TESTIMONY in his own words must be proved, in such a case, and not merely the substance of what he swore to, as shown by other witnesses, though testifying from notes taken at the time. *Id.*

See WITNESSES.

EXECUTIONS.

1. BIDDER AT EXECUTION SALE PROTECTED AGAINST PAYMENT OF HIS BID, WHEN.—Where one who had made advances to a manufacturing company, took, for the purpose of securing himself, the outstanding titles to lands of the company, giving a bond to convey to the company upon the discharge of his advances, and afterwards took judgment against the company for the amount of his advances, and caused the lands, of which he held the title, as above stated, to be sold on execution, and thereupon bid in the same for an amount less than that of his judgment, and received a deed of the property from the sheriff, without paying anything, upon giving the sheriff a bond of indemnity, against the consequences of any judgment that might be obtained against him for the amount of the bid, by prior judgment creditors, and afterwards judgment was obtained against the sheriff by prior judgment creditors: held, that said bidder was entitled to an injunction against the judgment. *Gist v. Davis*, 89.

2. REQUEST TO LEVY IS NO WAIVER OF NOTICE of the time and place of a sale on execution on the part of a judgment debtor, and a sale without such notice is void. *Mitchell v. Lipe*, 116.
3. EXECUTION DEBTOR'S POSSESSION IS NOT ADVERSE TO THE PURCHASER under the execution, but is that of a *quasi* tenant at will until actual disseisin or disclaimer, and such possession does not, therefore, render a subsequent sale by the purchaser void for champerty. *Id.*
4. OFFER TO REDEEM THE LAND on the part of the debtor is a recognition of the execution purchaser's title in such a case, which estops him from afterwards disputing it. *Id.*
5. SHERIFF'S RETURN OF AN EXECUTION SALE IS NOT EVIDENCE against the purchaser, or a purchaser from him, of the existence of a deed of trust, to which the sale is in such return stated to be subject. *Contra*, Peck, J., dissenting. *Id.*
6. FRAUD A QUESTION FOR THE JURY.—It is for the jury to determine whether a judgment and execution sale, in a particular case, constituted a mere contrivance to delay and defraud creditors, and such fraud is not to be presumed, but must be proved, though the proof may be circumstantial. *Floyd v. Goodwin*, 130.
7. A CONFESSION OF JUDGMENT NOT NECESSARILY FRAUDULENT, WHEN.—Where a number of notes are made by one person to another, judgments confessed thereon and executions issued on the same day, these are badges of fraud, as against other creditors; but the transaction is not fraudulent, if done fairly and in good faith to secure an honest debt, though also designed to give a preference. *Id.*
8. EXECUTION SALE PARTLY COLORABLE IS VOID.—Where a sale is made on a number of executions, some of which have been previously paid, there being no relation of principal and surety between the judgment-debtors, as to those so paid, or even when such relation exists, if the paid executions are made use of to deter competition or to swell the consideration so as to delay or defraud other creditors, such sale is wholly void; for a sale based partly on a fair, and partly on a colorable or fraudulent consideration, is within the statute of frauds. *Id.*
9. LEAVING THE EXECUTION DEBTOR IN POSSESSION does not render the sale fraudulent as against a *bona fide* purchaser, who is a stranger to the record, but where the plaintiff in the execution is the purchaser and leaves the debtor in possession, he must show that there was a fair and honest judgment, and that it was not a contrivance to hinder or defraud creditors. *Id.*
10. PURCHASER ON EXECUTION WHO HAS NOT PAID the purchase money to the plaintiff in execution, or become bound to do so at all events, is not in a position to contest the validity of a previous execution sale of the same property. *Id.*
11. ON AN EXECUTION SALE OF SLAVES, A BILL OF SALE REGISTERED as required by the act of 1784, is unnecessary, judicial sales not being within the act. *Id.*
12. FOR TAKING PROPERTY EXEMPT FROM EXECUTION, trespass is the proper form of action against the sheriff in Vermont. *Dow v. Smith*, 202.
13. A TWO-YEAR-OLD HEIFER, forward with calf, is within the statutory provision exempting a debtor's only cow from execution. *Id.*

14. **THE BENEFIT OF THIS EXEMPTION** is not lost by the fact of the debtor's retaining in his possession a cow which he had previously sold, notwithstanding *bona fide* purchasers and attaching creditors might seize such cow as the property of the debtor. *Id.*
15. **ON TRIAL OF RIGHT OF PROPERTY**, the claimant can not impeach for fraud the judgment under which the levy was made. *Hooper v. Pair*, 258.
16. **AMENDMENT OF AN EXECUTION** to conform it to the judgment may be made after a sale thereunder, on motion of the purchaser. *Doe v. Roe*, 368.
17. **A JOINT EXECUTION** on two separate judgments is unauthorized and void. *Id.*
18. **SALE OF QUARTER SECTION OF LAND** for five hundred and sixty-seven dollars, under an execution for eighty dollars, will not be treated as fraudulent or invalid, after the lapse of ten years. *Id.*
19. **VARIANCE BETWEEN SHERIFF'S DEED AND THE EXECUTION** is not fatal; the deed is not required to particularly describe the execution. *Id.*
20. **SUPERSEDEAS HAS NO RETROACTIVE EFFECT** so as to deprive the judgment of its force and authority, but only suspends its subsequent efficacy. Hence, where a *habere facias* is issued and executed after a certificate of *superseedeas*, but before such certificate is filed in the court where the judgment is, and before notice thereof to the officer or party, such execution is valid, and it is error to quash the writ and return, and award restitution. *Rumson v. Bennett*, 431.
21. **A DEBT SOLD UNDER EXECUTION** against the creditor is not extinguished by its purchase by the debtor through a third person, where a fair price has been prevented at the sale, by representations of the debtor, that he did not really owe the amount. *Eastin v. Dugat*, 461.
22. **A DEBTOR IS ENTITLED TO A CREDIT** on his debt, equal to the amount paid by him, in its attempted purchase, wherever the character of the transaction prevents its being upheld as a purchase. *Id.*
23. **EVIDENCE TO SHOW THAT AN OFFICER** after the return day is still considered the agent of the plaintiff for the receipt of the judgment is not admissible. *Wyer v. Andrews*, 497.
24. **DESCRIPTION OF PROPERTY SOLD BY SHERIFF, WHAT SUFFICIENT.**—Every reasonable intendment will be made in aid of *bona fide* purchasers at judicial sales, and to effectuate the object which it was the duty, and, as the law presumes, the design of the officer to accomplish; hence, this description in the schedule of property sold by the sheriff "to one, of land called and known by the name of 'Indian creek, with addition,' containing two hundred and seventeen acres, more or less," is sufficient. *Marshall v. Greenfield*, 559.

EXECUTORS AND ADMINISTRATORS.

1. **NO ACKNOWLEDGMENT BY AN ADMINISTRATOR** of a debt of his intestate, barred by the statute of limitations, can preclude him from pleading the statute to a count on the original cause of action; and no action on his own promise lies against him in his official character. *Fried v. Thomas*, 39.
2. **WHERE THERE ARE SEVERAL EXECUTORS**, there is no joint liability on the part of all for the separate act of one; but where several concur in an act, then their liability for that act is joint. *Johnson v. Johnson*, 72.

3. AN EXECUTOR CAN NOT SHIFT HIS RESPONSIBILITY for a fund come to his hands, by a transfer of the fund to a co-executor, but will, in the event of such transfer, be answerable for his co-executor in the same manner that he would be for a stranger whom he had enabled to receive the fund. *Id.*
4. ADMINISTRATOR IS PERSONALLY LIABLE for articles purchased by him, though they are for use of an estate. *Harding v. Evans*, 255.
See DETINUE, 2, 3, 4; GUARDIAN AND WARD, 2, 9.

EXECUTORY DEVISES.

See WILLS.

EXEMPTIONS.

See EXECUTIONS.

FACTORS.

See STOPPAGE IN TRANSITU.

FEMES-COVERT.

See MARRIED WOMEN.

FORCIBLE ENTRY AND DETAINER.

EVIDENCE, THE OBJECT OF WHICH IS TO SET UP TITLE to the freehold, adverse to the plaintiff, is not admissible in an action of forcible entry and detainer. *Mercereau v. Bergen*, 684.

FRAUD.

COMPROMISE PROCURED FROM A CONFIRMED INVALID, whose mental faculties, through long illness and confinement, may reasonably be supposed to have become weakened, and who has been induced to enter into the compromise solely by threats of legal proceedings, when there was no legal foundation for any claim whatever against him, and such compromise being unreasonable and unjust in its provisions, may be set aside in equity. *Underwood v. Brockman*, 407.

FRAUDULENT CONVEYANCES.

1. DEBTOR MAY PREFER CREDITORS, but not so as to delay other creditors by conveying as security to a particular creditor a larger amount of property than will satisfy the debt, and unreasonably postponing its appropriation. *Mitchell v. Beal*, 108.
2. DEED OF TRUST CONVEYING MUCH MORE PROPERTY THAN NECESSARY as security for a balance of a debt, and providing that the debtor shall retain possession for three years before selling to satisfy the debt, is fraudulent and void as to other creditors, although it appears that certain goods of the debtor shipped by the creditor, the proceeds of which are intended to apply to the debt, have not been heard from, and that if such proceeds are not so applied, the amount of the debt will be considerably increased. *Id.*
3. A CONVEYANCE BY A DEBTOR in satisfaction of a debt due by him, will be overreached in favor of other creditors, where the value of the prop-

- erty conveyed greatly exceeds the amount of the debt, the satisfaction whereof was the consideration of the conveyance. *Bailey v. Kennedy*, 351.
4. **PROPERTY CONVEYED TO A DEBTOR** under such circumstances, will, in equity, be deemed security, first to the grantee, and after he has received satisfaction therefrom, then for the other creditors. *Id.*
 5. **CONVEYANCES OF GOODS AND CHATTELS** where possession is retained by the vendor, are fraudulent *per se*, unless such retention be consistent with the object, intent, and stipulations of the deed of conveyance. *Thornton v. Davenport*, 358.
 6. **A BONA FIDE MORTGAGE OF PERSONAL PROPERTY**, though the possession is not changed, is valid against all persons, if by the stipulation of the mortgage it is provided that possession shall be retained by the mortgagor until the maturity of the mortgage debt. *Id.*
 7. **A MORTGAGE OF PERSONAL PROPERTY** will not justify the inference of fraud, from the other fact proved, that it was made on the day that a judgment was obtained against the mortgagor. *Id.*

GENERAL AVERAGE.

1. **WAGES AND PROVISIONS OF CREW** are subjects of general average for the period of detention of a vessel at an intermediate port, where necessitated for the repairing of the injuries of the vessel incurred on the voyage, and an insurer of a portion of the vessel is therefore liable for his proportion of such expense. *Hanse v. N. O. Ins. Co.*, 456.
2. **GOODS SHIPPED ON DECK AND LOST BY JETTISON** are not entitled to the benefit of general average. *Cram v. Aiken*, 503.
3. **IDEM.**—Nor does the fact that it is customary for vessels plying between the ports between which the plaintiff's goods were being transported, to carry merchandise on deck when the hold is full, entitle the plaintiff to contribution from the owner of the vessel. *Id.*
4. **IDEM.**—Nor does the payment of full freight for goods stored on deck entitle their owner to contribution if they are lost by jettison. *Id.*
5. **ADJUSTMENT OF A GENERAL AVERAGE** made by a broker on the protest and evidence furnished by the master may be set aside at the suit of owners of goods, by showing the culpable negligence or want of skill of the master. *Chamberlain v. Reed*, 506.
6. **THE MASTER, ON AN ADJUSTMENT OF GENERAL AVERAGE, HAS A LIEN** upon goods liable for contribution. *Id.*

GRAND JURY.

See JURY.

GUARDIAN AND WARD.

1. **THE GUARDIAN OF AN INFANT HEIR**, from the time of the division of the estate between the heirs, is responsible for the entire income of that part of the estate set off to his ward; and subsequent receipts, of parts of the income by the former executors, will not relieve him. *Johnson v. Johnson*, 72.
2. **AN EXECUTOR, GUARDIAN ALSO OF THE INFANT** entitled under the will, must account for the income of the estate coming to his hands in his capacity of guardian. *Id.*

3. A VERBAL DISCHARGE OF HIS GUARDIAN, by a ward just arrived of age, where there has been no accounting between the parties, and where misrepresentations of the guardian have induced the ward to believe that no funds belonging to the latter have been retained by the former, will not bar a subsequent bill for an account. *Id.*
4. IDEM.—A REGULAR RELEASE, under such circumstances, would not be supported. *Id.*
5. GUARDIAN WHO DEPOSITS IN HIS OWN NAME MONEY OF HIS WARD in a bank which subsequently fails, must bear the loss thereby occasioned, although the bank was at the time of the deposit sound, and the guardian then made on the certificate of deposit an indorsement that the money was the property of the ward. *Jenkins v. Waller*, 539.
6. TESTAMENTARY GUARDIANS STAND IN LOCO PARENTIS, and supersede those appointed by the orphans' court. *Matter of Van Houten*, 707.
7. MOTHER, ON DEATH OF A FATHER, SUCCEEDS to him as guardian by nature; but when the father appoints a testamentary guardian, the natural right of the mother must yield to the will of the father. *Id.*
8. FATHER'S INTENTION SHOULD BE CLEARLY MANIFEST in order to justify the taking away of this natural right of the mother. *Id.*
9. EXECUTORS DIRECTED BY WILL of testator to give to his infant son a good education, out of his estate, have the right to direct the education of such son, and to have the custody of his person so far as is necessary for that purpose; but this right should be exercised by them tenderly and discreetly, and with constant reference to the views and feelings of the mother. *Id.*

See PARENT AND CHILD; SURETYSHIP, 1.

HUSBAND AND WIFE.

1. A MARRIED WOMAN IS NOT BOUND BY THE DEED of her husband, of property settled to her separate use. *Boykin v. Ciples*, 67.
2. THE HUSBAND IS TRUSTEE, FROM NECESSITY, for the wife, where property has been settled to her separate use, but without the intervention of a trustee, and is therefore, in such case, a necessary party to a suit for the recovery of the property in behalf of the wife, and will in such suit dispense with the necessity of any farther *prochein amy*. *Id.*
3. IDEM.—THE HUSBAND, THOUGH HE MAY BE A TRUSTEE of necessity, is never a proper trustee, and if trustee from necessity, will be replaced by the court, upon a bill filed, concerning the wife's separate property, coming before it. *Id.*
4. GIFT TO A WIFE'S SEPARATE USE is sufficient if the words used denote an intent to exclude the husband from control over the property, or are incompatible with an intent that he should have such control. Technical language is not absolutely necessary. *Hamilton v. Bishop*, 101.
5. DEED CONVEYING A SLAVE TO A WIFE "AND THE HEIRS of her body * * * to the use and benefit" of the wife and her children, "to remain in the possession" of the said wife, "for the use and support of said children forever," is sufficient to vest the property to the wife's separate use. *Id.*
6. INTERVENTION OF A TRUSTEE is unnecessary to support a gift to a wife's separate use, for the husband will be constituted a trustee. *Id.*

7. **REGISTRATION IS UNNECESSARY** to sustain a deed to a wife's *separ à us* against the husband's creditors. *Id.*

ILLEGAL CONTRACTS.

See **CONTRACTS.**

IMPOSITION.

See **FRAUD.**

INDICTMENT.

IN AN INDICTMENT CONCLUDING CONTRA FORMAM STATUTI, where there is no statute upon which it was founded, the conclusion may be stricken out as surplusage, if the offense is known at common law. *State v. Buckman*, 646.

INFANCY.

INFANCY OF A PARTY CONTRACTING can not be set up by the other party in defense to an action brought by the minor, for the enforcement of the contract. *Arnous v. Lecassier*, 470.

INJUNCTIONS.

1. **APPLICATION TO A COURT OF EQUITY FOR THE EXERCISE OF ITS PROHIBITORY POWER** must come recommended by the dictates of conscience, and be sanctioned by the clearest principles of justice; and where a party has converted his deposits in a savings institution into stock of the company, and has, by reason of such conversion, received increased dividends, he will not, on the ground that the conversion was unlawful, be granted an injunction to prevent the officers of the corporation from paying the special depositors thereof, or receiving their certificates of deposit in payment of debts due to the institution, it having become insolvent. *Maryland Savings Institution v. Schroeder*, 528.
2. **FUND ARISING FROM THE CONVERSION OF THE DEPOSITS INTO STOCK**, by the depositors, with their own consent, is in the hands of the corporation as trustee for the special depositors as creditors of the institution, who became such on the faith of it; and a court of equity will not interpose to withdraw such fund from the destination to which it has been thus solemnly pledged. *Id.*
3. **COURT IN DETERMINING WHETHER INJUNCTION SHOULD ISSUE** in such case, will not consider the question whether or not the corporation, under its charter, had power to make the conversion of deposits into stock. *Id.*
4. **REMEDY BY INJUNCTION IS APPLICABLE ONLY TO SPECIAL INJURIES**, in violation of private right; and individuals are not authorized to redress public grievances at their own suit, either at law or in equity. *Del. and Md. Ry. Co. v. Stump*, 561.
5. **INJUNCTION WILL NOT BE DISSOLVED**, where fraud is charged in the bill on which it is granted, and the answer of the defendant is not full and satisfactory. *Scull v. Reeves*, 694.
6. **COURT CAN NOT BE SATISFIED WITH A GENERAL OR AN EVASIVE ANSWER**, where transactions are charged involving fraud, either actual or constructive, and especially where direct interrogatories are put in relation to particular facts. *Id.*

7. DEFENDANTS SERVED WITH INJUNCTION are personally responsible for a violation of the order of the court, no matter in what capacity, nor with what view they acted. *Quackenbush v. Van Riper*, 716.
8. INJUNCTION WILL BE GRANTED TO RESTRAIN a party who is about to cause serious and irreparable damage to his neighbor's property; but it ought not to issue if the injury is comparatively small, and may be compensated in damages. *Id.*
9. EQUITY WILL NOT INTERFERE BY INJUNCTION TO RESTRAIN A TRESPASS, where the injury does not appear to be irremediable and destructive to the estate, and where adequate satisfaction may be afforded by the ordinary legal remedy. *Id.*
10. DISSOLUTION OF AN INJUNCTION is not authorized by a mere denial on information and belief, where the injunction is sustained by the allegations in the bill. *Attorney-general v. Cohoes Co.*, 755.
11. COURT OF CHANCERY HAS JURISDICTION TO RESTRAIN any purpresture or unauthorized appropriation of public property to private uses, which may amount to a public nuisance, or injuriously affect the public interests. *Id.*
12. COURT MAY RESTRAIN INTERFERENCE WITH A PUBLIC CANAL by cutting through the embankment and taking water therefrom for private manufacturing purposes, at the suit of the attorney-general upon an information filed by the superintendent of the canal upon oath, to the effect that he believes the intended encroachment will injure public navigation, notwithstanding an opinion of the defendant, supported by his oath, that no public injury will ensue. *Id.*

INNKEEPERS.

1. FOR GOODS IN AN INNKEEPER'S CUSTODY, he is responsible in case of loss, except when occasioned by the servants or companions of the guest. *Albin v. Presby*, 679.
2. A SHEED IN AN OPEN YARD, under which the plaintiff's wagon is placed for the night, with his consent, is not a part of the inn so as to charge the innkeeper for loss. *Id.*

INSURANCE—FIRE.

1. MORTGAGEE IS NOT ENTITLED TO PROCEEDS of an insurance procured by the mortgagor, there being no agreement that such insurance should be effected by the latter for the benefit of the former. *Vandegraff v. Medlock*, 256.
2. THE VALUATION OF PROPERTY in a policy is binding upon the insurers in the absence of fraud. *Millaudon v. Western M. & F. Ins. Co.*, 433.
3. AN OWNER'S INSURABLE INTEREST REMAINS UNCHANGED, notwithstanding other insurance effected on the property to its value. *Id.*
4. THE RECOVERY BY AN OWNER WHERE SEVERAL INSURANCES EXIST on his property to more than its value, is restricted to the value of such property. *Id.*
5. INSURERS OF SEVERAL POLICIES on the same property are sureties between themselves, and therefore any one or more, who have paid the entire amount of a loss may recover from the others a proportionate contribution to the loss. *Id.*

6. A CLAUSE IN AN OPEN POLICY of insurance, restricting the liability thereon in case of subsequent insurances on the property to a ratable proportion of any loss that may occur, will not apply in the case of a subsequent valued policy expressed as intended to cover that part of the property left uncovered by the prior open policy. *Id.*
7. THE VALUE OF PROPERTY COVERED BY AN OPEN POLICY of fire insurance must be proved in case of loss. *Id.*
8. CONDITION IN A POLICY of fire insurance that the assured must procure a certificate of a magistrate, notary public, or clergyman, most contiguous to the place of the fire, that the fire occurred without fraud, before the loss shall be deemed payable, is precedent to the assured's right of recovery. And such certificate must be by the nearest, not by any magistrate. *Leadbetter v. Etina Ins. Co.*, 505.

INSURANCE—MARINE.

1. MISREPRESENTATION AS TO THE DATE OF SAILING of a vessel, made to insurers at the time of obtaining insurance thereon, is a material misrepresentation that it will invalidate the policy, if it be of a character to have caused the vessel to have appeared much less out of time than she in reality was. *Curell v. Miss. M. & F. Ins. Co.*, 439.
2. A MISREPRESENTATION OF A MATERIAL FACT will invalidate an insurance policy, whether it was made with the intention of deceiving or merely through error. *Id.*
3. A STATEMENT AS TO THE TIME OF SAILING of a vessel is a representation, and not a warranty. *Id.*
4. THE RELATION OF CONSIGNOR EXISTS where goods are shipped to a factor, though his authority over the goods is confined to a reception of them; therefore, where an open policy was taken out by A. on account of whom it might concern, and embracing all property consigned to him, property forwarded him was covered thereby, though the shipment was through inadvertence, and was followed by orders to deliver over the property as soon as received. *Ballard v. Merchants' Ins. Co.*, 444.
5. A CONSIGNOR MAY SUE IN HIS OWN NAME upon the open policy of his consignee, taken out for benefit of whom it may concern, and embracing the property consigned. *Id.*
6. A CONSIGNEE, WHOSE OPEN POLICY COVERS PROPERTY OF HIS CONSIGNOR, is agent of the latter with reference to the insurance, and authorized to receive payment of the amount due his principal on the policy. *Id.*
7. A CONSIGNEE CAN NOT BAR HIS CONSIGNOR'S RIGHT OF ACTION on such policy, by acts short of receiving payment of the amount due, or of canceling the policy; therefore, the fact that the consignee failed to enter on such open policy the name of his consignor, will not discharge the insurer. *Id.*
8. RECOVERY MAY BE HAD FROM AN INSURER of his proportion of the expenditure for the wages and provisions, in an action upon his policy, although the amount of contribution among the parties had not been previously settled, where the only property to contribute was that an aliquot part whereof was covered by his policy. *Hanse v. N. O. Ins. Co.*, 456.
9. CONDITION IN A POLICY, NOT PRECEDENT, WHEN.—A condition in a policy, that prior damage be repaired, does not postpone the attaching of

- the policy, as to perils embraced by it, other than those of navigation, where the period of time included in the policy is so short, that to require the making of the repairs as a condition precedent, would postpone the attaching of the policy for such length of time as to make it of little value. *Hyde v. Miss. M. F. Ins. Co.*, 465.
10. A CONDITION THAT REPAIRS BE MADE to a vessel imposes upon the insured an obligation of making the repairs before again exposing the vessel to the perils of navigation. *Id.*
 11. INSURED, BY HAVING INSERTED IN THE POLICY THE WORDS "WITH LIBERTY OF" a certain port, does not necessarily notify the insurer that the object of the privilege is to trade at that port; and procuring such words to be inserted is not an unequivocal intimation of the nature of the cargo insured; nor is it an intimation to the underwriters that the assured looks to such port, under any circumstances, in the contemplation of the parties, as that at which the voyage is designed to terminate. *Allegre v. Md. Ins. Co.*, 536.
 12. ASSURED, WHEN DEMANDING INSURANCE ON LIVE STOCK, MUST NOTIFY the assurer of the nature of the cargo; and his failure to do so vitiates the policy. *Id.*
 13. OWNERS OF AN INSURED VESSEL MAY SUE ON THE POLICY in their own names, where it states that the insurance was effected by certain brokers named therein, "for the owners, payable" to such brokers, and the said brokers consent to such suit, it not appearing that the insurers have any claim against the brokers so named in the policy. *Farrow v. Com. Ins. Co.*, 564.
 14. MASTER OF A VESSEL HAS NO IMPLIED AUTHORITY TO SELL HER without communicating with the owner or insurer, so as to enable the owner to claim for a total loss, on account of an injury to more than half her value, where, after the injury, she reaches her destination without repairs and is lying in safety at a wharf, and the master has ample opportunity to give notice of abandonment directly to the insurer, or indirectly through the agent of the owner, even though such sale is recommended by surveyors after a survey. *Peirce v. Ocean Ins. Co.*, 567.
 15. WHERE THE MASTER IS PART OWNER, the insurers are not liable as for a total loss, in case of an injury from one of the perils insured against to more than half the value of the vessel, where a sale is made by such master under circumstances which would not authorize him to sell as master. *Id.*
 16. CO-OWNERS ARE BOUND BY A SALE by the master who is part owner, where they ratify such sale by joining in a claim upon the underwriters for a total loss, crediting the proceeds of the sale by way of salvage after deducting all charges. *Id.*
 17. WITHOUT AN ABANDONMENT there can be no recovery for a mere constructive total loss arising from an injury to more than half the value of the vessel. *Id.*
 18. ABANDONMENT MUST BE POSITIVE AND ABSOLUTE, and must in express terms, or by necessary implication, import an actual present relinquishment of the interest or subject-matter to which the abandonment applies, and must truly state the reasons or grounds upon which the abandonment is made and a total loss claimed. *Id.*

19. ASSURED CAN NOT AVAIL HIMSELF OF ANY OTHER GROUND OF ABANDONMENT than that stated at the time of abandonment. Hence, where an abandonment is made on the ground of damage done to the vessel by a certain injury, and of her being afterwards surveyed, condemned, and sold for the good of all concerned, a subsequent claim for a total loss on the ground that the injury was such as to require repairs to more than half the value of the vessel, can not be sustained. *Id.*
20. ASSIGNMENT OF A POLICY ASSENTED TO BY THE INSURERS by a memorandum reserving to themselves all rights expressed therein "regarding premium notes, debts, etc.," where by the terms of the policy such assent is made necessary to an assignment, entitles the insurers to deduct from a loss payable to the assignee all premium notes and other debts then due them from the assignor, which, according to the provisions of the policy, they might have deducted if there had been no assignment. *Wiggin v. Suffolk Ins. Co.*, 576.
21. WHERE A LOSS IS ALREADY DUE THE ASSIGNOR on a previous policy from the same insurers, containing similar provisions as to deductions, which policy has never been assigned, all indebtedness due from the assignor to the insurers must be first deducted from that loss, leaving the balance only to be applied to a loss accruing on the policy subsequently executed and assigned. *Id.*
22. SUM DUE ON A BOTTOMRY BOND executed by the assignor of a policy to the insurers, may be deducted from a loss payable to the assignee who has taken the assignment subject to debts due the insurers from the assignor, without first resorting to the mortgaged vessel or the sureties in the bond. *Id.*
23. PARTY HOLDING TWO POLICIES OF INSURANCE on the same property, executed by different companies on the same day, and for the same amounts, and together exceeding the amount at risk, may recover a proportionate part of a loss from each company, or may recover the whole amount from either, and leave that company to seek contribution from the other. *Id.*
24. WHERE THE INSURED ACCEPTS ONE HALF THE LOSS from one of such companies, after deducting certain set-offs, he will be deemed, *prima facie*, to have elected to adjust the loss against the other upon the same basis. *Id.*
25. OVERVALUATION OF PROPERTY INSURED by a mutual insurance company in the representation made by the insured, whereby an insurance is effected to an amount exceeding that to which the company is authorized to insure, is binding if there be no fraud or concealment, and the insurers knew, or had full means of knowing, the real value of the property, and in case of a loss the company is liable for the full amount of the policy. *Borden v. Hingham Mut. F. Ins. Co.*, 614.

INTEREST.

1. INTEREST IS RECOVERABLE BEYOND THE PENALTY OF A BOND by way of damages for the detention of the debt, as against the principal debtor. *Mower v. Kip*, 748.
2. INTEREST IS RECOVERABLE ON A MORTGAGE beyond the penalty of a bond given as collateral security for the same debt, even though not recoverable in an action on the bond. *Id.*

INTRUSION.

See ESCHEAT.

JETTISON.

See GENERAL AVERAGE.

JOINT TENANTS.

See CO-TENANCY.

JUDGMENTS.

1. RELIEF IN EQUITY AGAINST A JUDGMENT will not be granted where the complainant is not shown to have exercised proper diligence in making his defense at law. *Collins v. Jones*, 216.
2. JUDGMENT BY DEFAULT OR CONFESSION is not evidence of the justness or existence of the debt, as against another creditor of the judgment debtor. *Hooper v. Pair*, 258.
3. JUDGMENT BY DEFAULT cures no other defects than those of form. *Whipple v. Fuller*, 330.
4. ERRONEOUS JUDGMENTS are valid until reversed. *Doe v. Roe*, 368.
5. JUDGMENT BY DEFAULT can not be entered while there are material issues made by the pleadings and not disposed of. *Harris v. Muskingum Mfg. Co.*, 372.
6. JUDGMENT IN AN ACTION OF DEBT on a guardian's bond, alleging fraudulent management of the plaintiff's estate, is a bar to a suit in equity by the plaintiff seeking to charge the guardian as trustee of the property alleged to have been misappropriated. *Emery v. Goodwin*, 475.
7. DECISION OF QUESTION IN ISSUE ON TRIAL AT LAW is conclusive as between the same parties, in a subsequent proceeding in equity, wherein the same issue is raised. *Sellman v. Bowen*, 524.
8. JUDGMENT CREDITOR NEGLECTING to enforce his lien in ten years after docketing his judgment, loses his legal priority over a mortgage by the debtor subsequent to such docketing. *Mower v. Kip*, 748.
9. JUDGMENT LIEN IS NOT EXTENDED beyond ten years by a revival of the judgment within the ten years as against a *bona fide* mortgage lien accruing after the docketing and before the revival. *Id.*
10. OBJECT OF A SCIRE FACIAS is not to extend the lien of a judgment, but to enable the creditor to enforce his lien by execution. *Id.*
11. JUDGMENT CREDITOR HAS NO LIEN FOR INTEREST upon a judgment recovered before the act of April, 1813, authorizing the collection of interest on executions on judgments thereafter recovered. *Id.*
12. EQUITY GIVES EFFECT TO THE LIEN of a judgment upon a legal title only so far as it can be enforced by execution at law. *Id.*

See RES JUDICATA.

JURY.

1. JUROR ONCE SWORN can not be challenged for any pre-existing cause. *Gillespie v. State*, 137.
2. GRAND JUROR SITTING ON TRIAL JURY.—The objection that one of the jurors in a criminal case was a member of the grand jury who found the indictment, if not taken before the juror is sworn, can not be made a

ground for a new trial, though the prisoner swears that the fact was unknown to him until the jury retired. *Id.*

LANDLORD AND TENANT.

1. A VALID CONTRACT FOR A LEASE ARISES where an authorized committee engages in writing that a certain person shall occupy a certain hotel, he paying therefor in advance, and that he shall have the refusal for two succeeding years. *Stanley v. Brunswick Hotel Corp.*, 435.
2. THE VALIDITY OF THE CONTRACT IS NOT IMPAIRED by the fact that the writing was drawn up on the representation of the lessee that he desired to show it to another for a certain purpose, but did not so show it. *Id.*
3. OWNER OF SHEEP IS PRIMA FACIE OWNER OF THE WOOL produced therefrom. *Chamberlin v. Shaw*, 586.
4. LESSEE OF SHEEP HAS NO PROPERTY IN WOOL, WHEN.—Under a lease of a farm and a number of sheep "to hold one year from the first of April, 1833, reserving five hundred and fifty pounds of wool of a quality of an average with the flock," providing that the sheep are not to be counted to the lessee till after shearing in June, 1833, and are to be counted back after shearing June, 1834, the lessee to take the risk of the sheep until then, the lessee has neither the general nor special property nor legal possession of the sheep from April to June, 1834, but only a right to enter and shear them, and is not the owner of any part of the wool until the lessor's share is separated. *Id.*
5. LESSEE'S RIGHT TO THE WOOL rests merely upon an executory contract until the lessor's share is separated. *Id.*
6. OWNER OF THE SHEEP MAY MAINTAIN TROVER against the lessee and a purchaser from him for a joint conversion of the wool before separation, where both, being together, and in possession, refuse to deliver it on demand, without showing that the purchaser had notice of the invalidity of the lessee's title. *Id.*
7. MEASURE OF DAMAGES in such an action is not the value of all the wool, but only of the share that would belong to the plaintiff after separation. *Id.*

LEASES.

See LANDLORD AND TENANT.

LEGACIES AND LEGATEES.

See WILLS.

LICENSE.

See TRESPASS, 2.

LIENS.

CREDITOR HAVING A LIEN ON TWO DISTINCT FUNDS may, in a court of law, resort to either, although other persons may have subsequent claims, so that his election may benefit one in preference to another. *Wiggin v. Suffolk Ins. Co.*, 576.

See JUDGMENTS; MORTGAGES, 3, 4, 5, 6.

LOST INSTRUMENTS.

A **LOST BOND** MAY IN EQUITY be set up to charge either a surety or an heir of the obligor. *Kerney v. Kerney*, 213.

LUNACY.

1. **TERM NON COMPOS MENTIS** had acquired a fixed legal import, prior to the adoption of the constitution of Pennsylvania, denoting a person entirely destitute or bereft of his memory and understanding, and it was with this signification that the term was introduced into the constitution and subsequent legislation of that state; therefore none of the courts of that state have power or authority to change this meaning so as to include any other description of persons, in a proceeding of lunacy, than such as shall appear to come fairly within the meaning so affixed to it. *Beaumont's case*, 33.
2. **RETURN OF INQUISITION**, held under commission in nature of writ *de lunatico inquirendo*, that the party, "by reason of old age and long-continued sickness, has become so far deprived of reason and understanding as to be wholly unfit to manage his estate," is not a sufficient finding that he is *non compos mentis*. *Id.*

MAINTENANCE, CHAMPERTY, AND BATTERY.

See ATTORNEY AND CLIENT, 1.

MALICIOUS PROSECUTION.

1. **A PROSECUTOR IS NOT LIABLE** for an indictment brought in by the grand jury, if that body found it in disregard of his evidence; as would be the case were they to find an indictment for one offense when the prosecutor's evidence before them was to the commission of another. *Leidig v. Rawson*, 354.
2. **MALICIOUS PROSECUTION—WHAT EVIDENCE INADMISSIBLE TO SHOW WANT OF MALICE.**—Where a witness was asked whether the prosecutor in an indictment for perjury, defendant in the present action for malicious prosecution, had not understood himself to have been prosecuted for larceny by the plaintiff, in a prior proceeding instituted against him by the latter, in a justice's court, the question was held improper; although the indictment for perjury was obtained because of the plaintiff's oath made in that proceeding. *Id.*
3. **MALICE AND WANT OF PROBABLE CAUSE** must concur to support an action for malicious prosecution. *Id.*
4. **AT COMMON LAW AN ACTION** upon the case may be maintained for a vexatious civil suit, in which there was no arrest or holding to bail. *Whipple v. Fuller*, 330.
5. **ACTION ON THE STATUTE** to prevent vexatious suits, can not be joined with an action on the case at common law for such a suit. *Id.*
6. **PROSECUTION OF AN INNOCENT PERSON** for the abstraction of a package from the mails, which package had been overlooked through carelessness in the search, is without probable cause, notwithstanding the assurance of the prosecutor, of error and mistake on his part. *Merriam v. Mitchell*, 514.
7. **FROM THE WANT OF PROBABLE CAUSE, MALICE** may be found. *Id.*

MARRIAGE.

See DIVORCE; DOWER, 2.

MARRIED WOMEN.

- A POWER OF APPOINTMENT BY WILL** given a married woman, by a deed conveying property to a trustee for her use, is valid, and does not need, to justify its exercise, the express consent of the husband. *Thompson v. Murray*, 68.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

- ACTION FOR COMPENSATION FOR EXTRA WORK** done by an apprentice during his apprenticeship, for his master, can not be maintained against the latter, even though such work was done upon his express promise to pay for it. *Bailey v. King*, 42.

MISTAKE.

- 1. MISTAKE OF LAW AS GROUND OF RELIEF.**—When it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and there has been no fair compromise of *bona fide* and doubtful claims, the contract may be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality. *Underwood v. Brockman*, 407.
- 2. COMPROMISE MAY BE SET ASIDE** for an obvious mistake of plain law, when there was no other motive for it and therefore nothing reasonably or intrinsically doubtful to be compromised; so where the compromise is evidence of fraud, surprise, or imbecility. *Id.*

MORTGAGES.

- 1. AN EQUITABLE MORTGAGE IS CREATED** by an indorsement at the time of her sale, on a ship's register, which is thereupon retained by the vendor, that the vessel shall not be sold until the notes given for her purchase money have been paid. *Welsh v. Usher*, 63.
- 2. IDEM.**—SUCH EQUITABLE MORTGAGE will be enforced against creditors who obtain subsequent legal lien, as by attachment, but not as against subsequent purchasers for value, without notice. *Id.*
- 3. RULE OF CHARGING DIFFERENT PARCELS** of mortgaged realty, alienated at different times, in the inverse order of alienation, applies to conveyances at different times, with warranty, by a grantee of the mortgagor as well as to successive conveyances by the mortgagor. *Guion v. Knapp*, 741.
- 4. MORTGAGEE HAVING RELEASED THE LAST PARCEL** of the mortgaged premises alienated by the mortgagor from the lien of the mortgage, the value of such parcel being then sufficient to pay off the mortgage, can not resort to the parcels previously alienated, where he had notice of such alienations, and if he had no notice thereof the amount received upon releasing the parcel last conveyed must be applied before resorting to the other parcels. *Id.*
- 5. RIGHT OF SO CHARGING ALIENATED PARCELS INVERSELY** is equitable, and not legal, and the incumbrancer is not affected by equities of which he had no notice. *Id.*
- 6. MORTGAGEE HAVING NO NOTICE OF AN ALIENATION** of part of the mortgaged land does not lose his lien thereon by releasing another part subsequently alienated. *Id.*

See FRAUDULENT CONVEYANCES, 6, 7; REPLEVIN, 4.

MUNICIPAL CORPORATION.

1. MUNICIPAL CORPORATION MAY REGRADE a street whenever it may deem such an improvement useful to the local public. *Keasy v. City of Louisville*, 395.
2. SUCH CORPORATION IS NOT LIABLE IN DAMAGES for mere inconvenience occasioned by the regrading of a street, to a lot-owner who has built his house to correspond with the grade of such street as originally established, where there is no intrusion upon his property nor any deprivation or obstruction of his enjoyment of any vested right therein, and where he is not thereby divested of its use. *Id.*
3. THERE IS NO IMPLIED AGREEMENT NOT TO CHANGE THE GRADE of a street once fixed by a municipal corporation, between the corporation and lot-owners along the street. *Id.*
4. A SEIZURE UNDER A MUNICIPAL ORDINANCE becomes a trespass *ab initio*, if there has been a failure to comply with the subsequent proceedings prescribed by the ordinance. *Baumgard v. Mayor*, 437.
5. A MUNICIPAL CORPORATION IS LIABLE FOR THE SEIZURE by its officers of property, in pursuance of its ordinances, when such seizure has been vitiated by subsequent conduct of the officers. *Id.*
6. CITY CAN NOT USE PRIVATE PROPERTY for public purposes without making just compensation therefor. *O'Fallon v. Daggett*, 640.

See CORPORATIONS; TOWNS.

NAVIGATION.

See SHIPPING.

NEGLIGENCE.

PROOF OF DELIVERY OF PROPERTY for the performance of service thereon, and its subsequent loss, is a sufficient *prima facie* showing for the plaintiff suing for its loss, alleged to have been occasioned by carelessness and neglect. *Marlatt v. Levee Steam Cotton Press Co.*, 468.

See PLEADING AND PRACTICE, 13.

NEGOTIABLE INSTRUMENTS.

1. PAYMENT IN THE BILLS OF AN INSOLVENT BANK, received as cash, neither party having knowledge of the insolvency, is valid, and no action can be afterwards brought on the debt, unless perhaps where the payee presents the bills to the bank, and upon refusal to pay them, gives due notice to the person from whom he received them. *Scruggs v. Gass*, 114.
2. NOTE NOT VOID AT ELECTION OF MAKER, WHEN.—Where a vendor of land, for which a note is given as part consideration, executes a bond acknowledging, among other things, that the contract is to be void if the note is not punctually paid, the "contract" referred to is the contract of sale and not the note, and the maker of the note or his surety can not set up as a defense to an action thereon that it has become void by non-payment at the day, the election to consider it void resting with the payee, and being determined by bringing the action. *Lane v. Manning*, 125.
3. AN INDORSEMENT IN BLANK OF A NOTE, whether negotiable or not, made by a stranger for the benefit of the payee, implies, in the absence of

countervailing proof, that such note is due, that the maker shall be able to pay it at maturity, and that it is collectible by due diligence. Such indorsement does not make the indorser a joint maker, nor an absolute guarantor, liable, at all events, on the dishonor of the note. *Perkins v. Catlin*, 282.

4. WHERE A NEGOTIABLE NOTE IS INDORSED in blank and delivered to a person who has no interest in it, to have it discounted, and he indorses it, before maturity, to a third person, without notice, in satisfaction of his own private debt, such person is a *bona fide* holder, and is unaffected by the equities of the previous parties. *Brush v. Scribner*, 303.
5. WHERE A NOTE IS SIGNED IN BLANK, the addition of another obligor before it is filled up, without the knowledge or authority of the original signer, is not such an alteration as to render it void against him. *Bank of Commonwealth v. McChord*, 398.
6. CHANGING THE DATE of such an instrument, where the date was not blank when signed, vitiates it, if the alteration is made without authority. *Id.*
7. INDORSER OF A NOTE OVERDUE is not liable thereon unless demand is made upon the maker within a reasonable time, and immediate notice of non-payment given to such indorser; so, though the maker is insolvent and has absconded. *Colt v. Barnard*, 584.
8. FIRM CAN NOT RECOVER AS INDORSEES of a promissory note signed by one of its members, in an action on such note; the remedy of the member of the firm who signed the note is against his co-makers for contribution. *Stevens v. West*, 630.
9. MERE ADDITION OF THE WORD "SECURITY" to the name of a joint maker of a note does not change the nature of his liability, nor is it, in itself, evidence that he stood in that relation to the other contracting parties. *Id.*

NEW TRIALS.

1. JUROR, IMPROPER INFLUENCE ON.—That, on a trial for counterfeiting, the jurors on entering their room for deliberation, find a placard there posted charging one of their number with being a counterfeiter, is no ground for setting aside their verdict or granting a new trial. *Hall v. Commonwealth*, 237.
2. WHERE, IN AN ACTION UPON A CONTRACT, in Connecticut, the decision is in accordance with the laws of the state, a new trial will not be granted, to give the unsuccessful party the benefit of the law of another state, not particularly insisted on at the trial, though the contract was made and the parties resided in that state. *Brush v. Scribner*, 303.
3. VERDICT WILL NOT BE SET ASIDE on the ground of the admission of irrelevant and immaterial evidence. *Merriam v. Mitchell*, 514.

ORPHANS' COURT.

See PROBATE COURTS.

PARENT AND CHILD.

1. A FATHER HAS NO AUTHORITY TO RECEIVE A LEGACY left his child, and an executor paying the father from the funds of the estate, the amount of the legacy left his infant son, is liable to an account to the estate for such sum. *Johnson v. Johnson*, 72.

2. A FATHER OF SUFFICIENT ABILITY is liable for the support and maintenance of his child, notwithstanding that the latter has property of his own. *Id.*
3. GIFT FROM A FATHER TO HIS INFANT CHILD, in good faith, is as valid as if made by a stranger. *Williams v. Walton*, 122.
4. FATHER'S POSSESSION AS NATURAL GUARDIAN of a chattel given to his infant child by himself or another, continued *bona fide* for the required period, vests a good title in the child under the statute of limitations. *Id.*

PARTNERSHIP.

1. CONTRACT BETWEEN TWO FIRMS HAVING COMMON PARTNER.—Where the same person is partner in two firms, and a note is made by one firm to the other, an action can not be maintained thereon by the latter firm against the partner in the other, who does not belong to both firms. *Banks v. Mitchell*, 106.
2. SEPARATE CREDITORS OF THE MEMBERS OF AN INSOLVENT FIRM are entitled to the separate property of their debtors, and only the surplus left after satisfying them can be applicable to the discharge of the partnership debts. *Bailey v. Kennedy*, 351.
3. AN AGREEMENT WITH A CLERK, that he shall receive a proportion of the profits of a business, as a compensation in addition to a fixed salary, does not constitute him, as between the parties, a partner in the business, and he may therefore be sued at once, for funds of the house in his hands, which he refuses to turn over. *St. Victor v. Daubert*, 447.
4. THE TITLE TO REAL ESTATE BOUGHT WITH PARTNERSHIP FUNDS vests in the separate partners, as joint owners, and any one may sell his undivided share. *Baca v. Ramos*, 463.
5. A PARTNER SELLING HIS RIGHT IN REAL ESTATE bought with partnership funds is liable to an account to his copartners for the price paid. *Id.*
6. A SALE BY A PARTNER TO A COPARTNER, of his interest in the partnership, bars him of his right to demand partition of the real estate purchased with the partnership funds. *Id.*
7. SEALED CONTRACT, EXECUTED BY ONE PARTNER in the name of the firm without previous authority or subsequent ratification by his copartner, does not bind the latter. *Van Deusen v. Blum*, 582.
8. SUCH PARTNERS ARE LIABLE ON A QUANTUM MERUIT and *quantum valebat* for labor and materials furnished to the firm before its dissolution in attempted execution of such invalid contract, it being for a purpose within the scope of the partnership, though the work is not completed until after the dissolution. *Id.*
9. A PARTY CAN NOT BE PLAINTIFF AND DEFENDANT in the same action. *Burley v. Harris*, 650.
10. A PARTNERSHIP CAN NOT SUE ONE OF ITS MEMBERS at law. *Id.*
11. DEBTOR COLLUDING WITH OUTGOING PARTNER can not obtain from him a discharge of his debt. *Id.*
12. UNTIL A FINAL ADJUSTMENT OF ALL PARTNERSHIP ACCOUNTS, and a specific sum due to some one partner, no action can be sustained by one member of a firm against another. *Id.*
13. ASSIGNMENT OF ALL PARTNERSHIP DEMANDS to one of the firm, including a claim against such assignor, does not entitle the firm to sue such assignor. *Id.*

14. FOR THE PRIVATE DEBT OF A PARTNER, partnership property can not be seized under attachment or execution. *Morrison v. Blodgett*, 653.
15. PARTNERSHIP EFFECTS are a fund to be applied first to the payment of the partnership debts; and the interest of a partner therein is only his share of the surplus after they are paid. *Id.*
16. ONE PARTNER HAS NO RIGHT TO CONVERT the partnership goods to his own purposes. *Id.*
17. A PARTNER'S INTEREST IN THE PARTNERSHIP GOODS may be seized and sold under execution, but the goods themselves, or any part thereof, can not be seized. *Id.*
18. WHETHER PURCHASER OF SUCH INTEREST is to be considered a tenant in common with the other partners, *quære*. *Id.*
19. A NEW PARTNERSHIP UNDERTAKING TO PAY the debts of the old firm, which comprised some of the same members, will not be permitted to deny a receipt given for the goods of such new firm attached for a debt of the first partnership, nor to allege that such debt was but an individual debt. *Id.*
20. JOINT CREDITORS OF AN INSOLVENT PARTNERSHIP are entitled to a preference over separate creditors of the individual partners in payment out of the property of the firm; and the separate creditors of an individual partner have a like preference over the partnership creditors in payment out of such partner's estate in case of his death or bankruptcy. *Payne v. Matthews*, 738.
21. RIGHTS OF SOLVENT PARTNER OF DECEASED INSOLVENT.—Where a firm is dissolved, leaving one of the partners largely indebted to the concern, and the latter afterwards dies insolvent, his solvent surviving partner having been compelled to pay debts of the firm out of his own property, is entitled to share in the deceased partner's estate for the balance due him, equally with other creditors having unliquidated demands or accounts, etc., constituting debts of the fourth class under the statutes. *Id.*
22. SUCH DEMAND MAY BE LIQUIDATED by the surrogate in settling the estate, or by a decree of the court of chancery after a reference. *Id.*

PAYMENTS.

1. APPLICATION OF PAYMENTS.—The debtor may direct to what debt his payment shall be applied, but if he waives the right to do so, the creditor may make the application, and if both are silent the law must decide. *White v. Trumbull*, 687.
2. LAW WILL MAKE A PRO RATA APPLICATION in a case where the debtor was equally bound to pay both debts, and where his acts showed a substantial blending of the claims, and there was a virtual appropriation by both parties to the claims so blended, at the time the payments were made. *Id.*

See DURESS.

PLEADING AND PRACTICE.

1. ONE CAN NOT AVER CONTRARY TO A BOND or record declared on. Therefore, a declaration on an appeal bond, averring that by mistake the name of a wrong person was inserted in said bond, and in the decree sub-

- sequently entered in the appealed suit, as one of the appellees in said suit, is bad on demurrer. *Dibrell v. Miller*, 126.
2. ON A PLEA OF NUL TIEL RECORD, A VARIANCE between the decree relied on and that offered in evidence, as to the name of one of the parties in whose favor the decree was entered, is fatal, and can not be helped by an averment that the name was inserted by mistake. *Id.*
 3. DEMURRER GOES BACK TO THE FIRST FAULT in pleading. *Id.*
 4. THE COURT IS NOT OBLIGED TO GIVE AN OPINION upon the weight of the testimony. *Vincent v. Stinehour*, 145.
 5. REMEDY BY MOTION may now be obtained where formerly the party would have been entitled to an *audita querela*. *Per* Brockenbrough, *J.* *Steele v. Boyd*, 218.
 6. PROCESS MAY BE QUASHED ON MOTION if irregularly or fraudulently executed. *Per* Brockenbrough, *J.* *Id.*
 7. OBJECTION THAT ONE OF THE SUBSCRIBING WITNESSES TO A WILL was not produced and sworn, can not be made for the first time in the appellate court, especially if the record does not show that his absence was not accounted for. *Apperson v. Cottrell*, 239.
 8. DEFECT OF PARTIES held not to be sufficient to reverse a decree, if it is regular as to the party appealing. *Bumpass v. Webb*, 274.
 9. GENERAL PLEA OF FRAUD, COVIN, and misrepresentation, is good in an action of assumpsit for goods sold and delivered, even when assailed by special demurrer. *Elliott v. Coggeshall*, 365.
 10. IMPROPER MISJOINDER of two causes of action is not cured by plea and judgment, where the defendant pleaded the general issue, and then suffered judgment by default. *Whipple v. Fuller*, 330.
 11. THE TRIAL JUDGE IS NOT REQUIRED TO GIVE INSTRUCTIONS irrelevant to the evidence offered. *Hanes v. N. O. Ins. Co.*, 456.
 12. ERROR IN VERDICT APPEARING AS A MATTER OF CALCULATION will be corrected and proper verdict ordered entered. *Id.*
 13. ALLEGATION OF LOSS OF PROPERTY through the negligence and carelessness of the defendants is equivalent to an averment of destruction. *Herrin v. Eaton*, 499.
 14. A CAUSE BROUGHT BEFORE AN APPELLATE COURT ON ONE COUNT can not be heard on another count struck out in the court below. *Duncan v. Sylvester*, 512.
 15. IN ASSUMPSIT AGAINST SEVERAL DEFENDANTS, a promise by all must be proved. *Cutts v. Gordon*, 520.
 16. *IDEM.*—An exception is made where one of the defendants is an infant; he may plead his infancy and a recovery be had against the other defendants. *Id.*
 17. PLEADING CONSIDERATION.—A declaration which alleges that the defendant, in consideration of a certain sum to be paid to him by the plaintiff, promised to do certain things, for breach of which promise the action is brought, is bad after verdict, because it fails to allege any agreement between the parties, or any consideration for such promise by the defendant. *Pa. etc. Nav. Co. v. Dandridge*, 542.
 18. COUNTS IN DEBT OR ASSUMPSIT ON A QUANTUM MERUIT or *quantum valebat*, may be joined in the same declaration with counts on a specialty. *Van Deusen v. Blum*, 582.
 19. DECLARATION IN TROVER FOR CONVERSION OF PROMISSORY NOTES need

not state their dates or time of payment. *Bank of New Brunswick v. Nelson*, 691.

20. COUNT IN SUCH DECLARATION, WHICH DESCRIBES the notes as "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the said promissory notes in the first count mentioned," is bad on special demurrer, because it mixes them all together, without distinguishing the drawer and indorser of one note from another. *Id.*
21. REFERENCE MAY BE MADE TO PRIOR COUNT to avoid great prolixity. *Id.*

See CORPORATIONS, 1, 3; COSTS; ESTOPPEL, 1; PROBATE COURTS; REPLEVIN; VARIANCE.

PREFERRING CREDITORS.

See ASSIGNMENTS; FRAUDULENT CONVEYANCES.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY

See SURETYSHIP.

PRIVIES.

See RES JUDICATA.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURTS.

1. COUNTY COURTS IN ENGLAND, prior to the reign of William I., had jurisdiction of testamentary causes. *Apperson v. Cottrell*, 239.
2. ORIGINAL JURISDICTION OF PROBATES belongs in England to the ecclesiastical courts, and to some of the courts baron. *Id.*
3. ORPHANS' COURTS IN ALABAMA have general plenary jurisdiction of all testamentary cases; and, except in peculiar cases, this jurisdiction is exclusive. *Id.*
4. JURY MAY BE IMPANELED IN ORPHANS' COURT to try the issues joined with respect to a will which is alleged to have been duly executed and afterwards destroyed by the testator while insane. *Id.*
5. BILL OF EXCEPTIONS is necessary in orphans' court to reserve a question for presentation to the supreme court, and the latter court will not look beyond such bill. *Id.*

PROCESS.

1. A SHERIFF SHOULD EXECUTE PROCESS with the utmost expedition, or as soon after he receives it as the nature of the thing will admit. *Wyer v. Andrews*, 497.
2. AN OFFICER CAN NOT CONTRADICT or invalidate his own return under oath. *Id.*

See PLEADING AND PRACTICE, 6.

REPLEVIN.

1. PLAINTIFF IN REPLEVIN MUST SHOW AN UNLAWFUL TAKING or detention

to support the issue on his part under a plea of *non cepit*. *Simpson v. McFarland*, 602.

2. DEFENDANT CAN NOT HAVE JUDGMENT FOR A RETURN of the property where he prevails under a plea of *non cepit* in replevin, but he may have a return awarded where he pleads property in himself or another. *Id.*
3. NON CEPIT AND PROPERTY IN ANOTHER may be pleaded together in replevin. *Id.*
4. IN REPLEVIN BY A MORTGAGEE against the mortgagor of chattels, where the mortgage was not recorded in the proper county, and the goods have been attached by a creditor of the mortgagor, the defendant, upon a judgment of nonsuit, because no wrongful taking or detention was shown, can not have a return of the property awarded, he not being entitled to the possession against the mortgagee, nor liable to the attaching officer. *Id.*

RES JUDICATA.

1. A PLEA OF A FORMER DECREE between the parties, as to the same matters presented by the bill, will not be sustained by proof of a decree in a former suit, wherein the same relief was sought, but which failed owing to a defect in the bill in that suit, which is remedied in the bill now before the court. *Gist v. Davis*, 89.
2. BOND TO INDEMNIFY DOES NOT MAKE PRIVY TO JUDGMENT.—Where a bond to indemnify against any judgment that may be obtained upon a certain matter, is given, and where, upon suit brought upon that matter, notice is given to the obligor in the bond to come in and defend, whereupon the obligor does defend the action in the name of his obligee, yet said obligor is not a privy to the judgment, so as to be precluded from again litigating the same matters, and may therefore obtain, in his own name, an injunction against the judgment, upon grounds that might have been urged in defense to the original action. *Id.*
3. *IDEM.*—THE VERDICT WOULD BE CONCLUSIVE, however, in such action, in favor of the sheriff in a subsequent action by him, upon his bond of indemnity. *Id.*

RETURN.

See EXECUTIONS, 5.

SALES.

BILL OF SALE OF A NEGRO REGISTERED, but not proved by two witnesses, passes the title as between the parties. *Williams v. Walton*, 122.

See STOPPAGE IN TRANSITU.

SHERIFFS.

AN ACTION OF TRESPASS DOES NOT LIE against a sheriff for arresting, in obedience to his precept, a person who happens to be privileged from arrest. *Carle v. Deliedernier*, 508.

See PROCESS.

SHERIFF'S DEEDS.

See EXECUTIONS.

SHERIFF'S SALES.

See EXECUTIONS.

SHIPPING.

1. A VESSEL PROPELLED BY STEAM must alter her course to avoid a collision with a sailing vessel, where the latter, at the time that the collision is threatened, has not the use of her sails. *Same v. Tourne*, 452.
2. A CUSTOM THAT A STEAM VESSEL ASCENDING HAS A RIGHT to a certain side of the river applies as to other vessels of the same class, but not as to sail vessels, and therefore can not excuse a collision with a vessel of the latter description. *Id.*

See GENERAL AVERAGE.

SLANDER.

1. CHARGING ONE WITH BURNING THE GIN or cotton-house of another, is actionable *per se*. *Waters v. Jones*, 261.
2. CHARGE NEED NOT BE DIRECT AND POSITIVE to make it slanderous; it is sufficient that from it the imputation of criminality may be inferred. *Id.*
3. EXPRESSING SUSPICION, or speaking ironically, or by way of comparison or interrogation, may make one guilty of slander. *Id.*
4. TO SAY OF ONE, "I BELIEVE, or I have reason to believe," he committed arson or larceny, is equivalent to charging him with a crime, and is actionable. *Id.*
5. TO SAY OF ONE, "I HAVE BEEN INFORMED HE IS GUILTY of arson," the name of the informant not being stated, is actionable. *Id.*
6. CHARGING A CRIME ON HEARSAY is slander. Hence it is actionable to say of one, that it is the general opinion of the people in the neighborhood that he burned the gin-house of another. *Id.*
7. CHARGING ONE WITH BEING IN A SUSPICIOUS PLACE under suspicious circumstances does not impute a crime to him. *Id.*
8. GENERAL CHARACTER OF PLAINTIFF, suing for damages arising from slander, may be proved by the defendant to mitigate damages. *Id.*

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE WILL BE DECREED AGAINST AN HEIR AT LAW on a contract of sale made by his ancestor, though such contract did not purport to be obligatory on the heirs. *Moore v. Fitz Randolph*, 208.
2. MUTUALITY OF CONTRACT is a prerequisite to a decree for specific performance. It is sufficient that this mutuality exist when the contract is made; subsequent events destroying this mutuality do not render the contract inoperative. *Id.*
3. AFTER RECOVERY BY A VENDEE FOR A BREACH of a covenant to convey, against the administrators of a deceased vendor, it is too late for the latter to maintain a bill against such vendee and the heirs of the vendor for specific performance. *Id.*

STATUTES.

1. AN ACT SUSCEPTIBLE OF TWO INTERPRETATIONS will be given that which will render it constitutional and valid. *Boisdere v. Citizens' Bank*, 453.
2. THE WORD "BE" will be construed as meaning "become" when this is necessary to save an act from the objection of being unconstitutional and void. *Id.*

STATUTE OF FRAUDS.

DEED UPON VALUABLE CONSIDERATION does not come within the provisions of the statute of frauds and perjuries. *Thornton v. Davenport*, 358.

STATUTE OF LIMITATIONS.

1. **ANY UNQUALIFIED ADMISSION THAT A DEBT IS THEN DUE**, or that a liability therefor still exists, takes the case out of the statute of limitations; for, from such admission, a promise to pay is implied. *St. John v. Garrow*, 280.
2. **ADMISSION TO TAKE A CASE** out of statute of limitations may be made to a stranger as well as to the creditor. *Id.*
3. **ACKNOWLEDGMENT REVIVING A DEBT** may be proved under a general replication to a plea of the statute. *Id.*
4. **A GENERAL ACKNOWLEDGMENT OF INDEBTEDNESS**, without specifying the nature or extent thereof, in favor of the payee of a note, will not interrupt the running of the time of prescription, as to such note. *Cowsey v. Williams*, 466.

See DOWER, 5; EXECUTORS AND ADMINISTRATORS, 1.

STOPPAGE IN TRANSITU.

1. **VENDOR'S RIGHT OF STOPPAGE IN TRANSITU** is not superseded by an attachment of the goods by a creditor of the vendee, while in transit in the hands of a common carrier or forwarder. *Hause v. Jordan*, 377.
2. **VENDOR HAS THE SAME RIGHT TO THE PROCEEDS** as he had to the goods where his right is asserted after they are converted into money, under an order of the court issuing the attachment, but before an appropriation of the proceeds or an adjudication of the rights of the parties. *Id.*
3. **COURT OF CHANCERY MAY ENFORCE THE RIGHT** of stoppage *in transitu*, especially when the goods are already under the control of that court by an attachment in chancery. *Id.*
4. **CHARGES AND EXPENSES OF THE FORWARDER** in whose hands the goods were attached and by whom they were sold, under the chancellor's order, must be first paid out of the proceeds in such a case. *Id.*
5. **A FACTOR OR AGENT WHO PURCHASES GOODS** for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor as to be entitled to stop the goods *in transitu*. *Newhall v. Vargas*, 489.
6. **THE RIGHT OF STOPPAGE IN TRANSITU IS NOT AFFECTED** by taking bills drawn by the master upon the vendee. *Id.*
7. **THE RECEIPT OF COMMISSION** by one who becomes responsible for the value of goods shipped to another does not impair the right of stoppage *in transitu*. *Id.*
8. **THE RIGHT OF STOPPAGE IN TRANSITU** on the insolvency of the purchaser is in the nature of an equitable lien, enabling the vendor to resume possession until the price is paid. *Id.*
9. **THE RIGHT CEASES** where the goods are shipped on board a vessel, appointed by the vendee to be transported, not to his residence or to be received by him, but to other markets. *Id.*
10. **BUT THE RECEIPT OF THE GOODS BY THE MASTER** of the vendee's ship, to be transported to the place of the vendee's residence, does not end the transit. *Id.*

11. **THE VENDOR IS NOT OBLIGED TO REFUND** what may have been received in part payment to entitle him to exercise his right of stoppage. *Id.*
12. **A VENDOR MAY RATIFY** an undirected act of his correspondent in claiming the goods, and thereby make a valid stoppage *in transitu*. *Id.*
13. **NOTICE TO THE CARRIER**, or to any one having charge of the goods before the transit ends, is sufficient, and does not cease merely by the interposition of a claim on the part of the consignee. *Id.*

SUCCESSION.

1. **THE RULE OF THE COMMON LAW THAT AN HEIR** must be of the blood of the first purchaser is abrogated in Delaware by the statute regulating the course of descent. *Kean v. Hoffecker*, 336.
2. **SEISIN IS NOT NECESSARY**, in Delaware, to make stock of descent. *Id.*
3. **AN HEIR ASSUMING THE LIABILITIES OF A PURCHASER** of part of the succession property is liable to his co-heirs therefor only in the amount due them of the unpaid purchase money, and not in the amount due to each upon a final settlement of the whole succession. *Arnous v. Lesassier*, 470.

SURETYSHIP.

1. **THE SURETY ON A GUARDIAN'S BOND IS LIABLE**, upon the default of his principal, to the extent of the penalty of the bond as respects defaults concerning not only the estate of the minor, as it was at the time of the appointment, but also as to that subsequently acquired. *Johnson v. Johnson*, 72.
2. **RELEASE OF SURETY.**—Where, on a judgment against the principal on a bond and his two sureties, an execution is levied on property of the principal sufficient to satisfy the judgment, but the property is released by the execution of a delivery bond by the principal and one of the sureties together with other parties, the other surety refusing to join therein and desiring the sheriff to proceed, the latter is discharged, and is not liable for contribution to his co-surety, who, after forfeiture and judgment on the delivery bond, pays the whole amount of the judgment. *Brown v. McDonald*, 112.
3. **SURETY ON FORTHCOMING BOND IS RELEASED** if the creditor makes an agreement with the principal debtor to give the latter time, and to take a specified sum payable in annual installments in satisfaction of the bond. *Steele v. Boyd*, 218.
4. **RELIEF UPON THE MOTION OF A SURETY** on a forthcoming bond may be granted in a proper case in the court in which the bond was taken. That court may direct an *exoneretur* of the surety, and need not require him to seek his remedy by *audita querela* nor by bill in chancery. *Id.*

TENANTS IN COMMON.

See Co-TENANCY.

TOWAGE.

USE OF REASONABLE CARE AND DILIGENCE ONLY is required of one who, without expressly agreeing to insure against all losses or injuries that may arise, undertakes to tow a vessel out of a harbor, through the ice therein; such contractor is not liable to the same extent as a common carrier. *Pa. etc. Nav. Co. v. Dandridge*, 543.

TOWNS.

1. TOWN CLERK MAY, WHILE HE REMAINS IN OFFICE, AMEND the records of town meetings, to conform to the truth. *Chamberlain v. Dover*, 517.
2. THE ACTS OF THE MAJORITY PRESENT at town meetings bind not only the minority, but all who are absent. *Id.*
3. PUBLIC NOTICE OF TIME AND PLACE OF MEETING must be given; and a meeting can not be adjourned by the few townsmen present to a distant part of the town on the same evening, of which time and place of adjournment other townsmen subsequently arriving receive no notice. *Id.*
4. A MEETING FAIRLY ORGANIZED possesses the incidental power of adjournment to a future time. *Id.*
5. TOWN MEETINGS MUST BE HELD at the place appointed. A meeting to be held at a school-house must be held within its walls. *Id.*
6. ADJOURNED MEETING MUST BE FROM A REGULAR MEETING valid as to time and place. *Id.*
7. WHERE THE RECORD SHOWS that the meeting was not at the place appointed, testimony is admissible to show that an irregular meeting was held at another place, and what was there done. *Id.*
8. THE RECONSIDERATION AT A REGULAR MEETING of acts done at a previous irregular meeting can not be construed as a ratification of such acts. *Id.*
9. TOWN IS BOUND TO REPAIR HIGHWAYS within its bounds at the expense of the inhabitants. *Bancroft v. Lynnfield*, 623.
10. TOWN MAY INDEMNIFY A SURVEYOR or other officer against liability incurred in the *bona fide* though mistaken discharge of the duty of the town to repair highways. *Id.*
11. TOWN HAVING APPOINTED A COMMITTEE TO DEFEND an action brought against a surveyor for digging a ditch to improve a highway, or for the purpose of having the bounds of the highway legally determined, is liable for the expenses and services of the committee in discharging that duty. *Id.*

TRESPASS.

1. TRESPASS WILL NOT LIE where the injury is the result of an involuntary act, and no blame attaches to the defendant. *Vincent v. Stinchour*, 145.
2. ENTRY UNDER A LICENSE, and an abuse of the privilege, do not make the licensee a trespasser *ab initio*. *Wendell v. Johnson*, 648.
3. ENTRY UNDER A CONTRACT FOR THE PURCHASE OF LAND, and a trespass committed thereon, and refusal to complete the purchase, make the vendee a trespasser *ab initio*. *Id.*

See CO-TENANCY; SHERIFFS.

TROVER.

See LANDLORD AND TENANT, 6; PLEADING AND PRACTICE, 19, 20.

TRUSTS AND TRUSTEES.

1. THE UNACCOUNTED BALANCE OF A FUND intrusted to the management of several, will be charged to those in default through failure to account. *Johnson v. Johnson*, 72.
2. ESTATE CONVEYED IN TRUST TO TWO PERSONS, one of whom refuses to act as trustee, vests in the other. *Scull v. Reeves*, 694.

3. **RESULTING TRUST, WHEN RAISED.**—Where, at sheriff's sale under foreclosure, the premises are purchased by an agent who pays no part of the purchase money, but takes a conveyance in his own name, a resulting trust is raised in favor of the principal. *Depeyster v. Gould*, 723.

VARIANCE.

1. **ALLEGATION OF TOTAL NEGLIGENCE AND REFUSAL TO PERFORM** an engagement, is not sustained by proof of a negligent and imperfect performance. *Pa. etc. Nav. Co. v. Dandridge*, 543.
2. **DECLARATION WHICH ALLEGES A CONTRACT** to tow out a vessel and cargo safely, is not sustained by proof of a contract to tow out free from a particular description of danger. *Id.*
3. **DECLARATION WHICH MERELY DESCRIBES AS "GOODS, CHATTELS, wares, and merchandise,"** the cargo of a vessel, for the failure to tow out which safely the action is brought, does not contain a description sufficiently certain and definite. *Id.*
4. **EVIDENCE OF NEGLIGENCE** is not admissible to support an issue of total neglect and refusal to perform. *Id.*
5. **QUESTION OF VARIANCE BETWEEN ALLEGATION AND PROOF** can not be raised, for the first time, in this court, since the passage of the act of 1825. *Id.*

See EVIDENCE, 7, 8; EXECUTIONS, 19; PLEADING AND PRACTICE, 2.

VENDOR AND VENDEE.

1. **AN AGREEMENT TO GIVE A GOOD AND VALID DEED** calls for a deed that will convey the title to the land. *Stow v. Stevens*, 139.
2. **WHERE A VENDOR WHO AGREES TO CONVEY**, upon the payment of money and the execution of notes, at a certain time, before that time conveys to another, the vendee in an action for the breach must aver readiness to perform, although a tender of performance is not necessary. *Id.*
3. **IN SUCH A CASE, IF PART OF THE MONEY HAS BEEN PAID**, the vendee may regard the contract as rescinded, and sue in assumpsit for the sum advanced. *Id.*
4. **RIGHT OF POSSESSION UNDER A CONTRACT FOR THE SALE OF LAND** remains in the vendor until full payment is made and the vendee has complied with everything required to entitle him to a conveyance; it is not sufficient that he has paid part of the purchase price and executed his notes for the residue. *Holmes v. Schofield*, 364.
5. **VENDOR MAY MAINTAIN HIS ACTION FOR THE PURCHASE MONEY**, without having executed a conveyance of the land, or offered to do so, when the promise to pay is independent of the covenant to make title. *Hageman v. Sharkey*, 627.

See ESTOPPEL, 2; TRESPASS, 3.

VERDICT.

See NEW TRIALS, 3.

VOLUNTARY CONVEYANCES.

See COVENANTS IN DEEDS, 3.

WASTE.

TENANT FOR LIFE IS LIABLE TO ACCOUNT FOR WASTE where he has cut down more of the wood on the estate than is necessary to the enjoyment of his estate, to the injury of the remainder in fee. *Johanson v. Johanson*, 72.

See CO-TENANCY, 1.

WATER-COURSES.

1. GRANT OF A SEVERAL FISHERY IN A PUBLIC NAVIGABLE RIVER can not be presumed from the mere uninterrupted use and enjoyment of the right of fishing for upwards of twenty years. *Del. and Md. Ry. Co. v. Stamp*, 561.
2. COURT WILL NOT PRESUME A GRANT OF LAND under navigable waters, to the owners of the adjacent soil, without evidence of long exclusive possession and use, and the omission to make such averment in a bill for an injunction to protect the complainant in the exclusive right of fishery in such waters, is fatal thereto. *Id.*
3. GRANT OF LAND BY GOVERNMENT must be interpreted by the law of the country in force at the time when it was made; and therefore a grant, made by the king of Spain, of land bordering on a river, must be interpreted by the Spanish law then in force. *O'Fallon v. Daggett*, 640.
4. BANKS OF NAVIGABLE RIVERS, granted to private owners, may, by the Spanish law, be used by navigators for the purpose of landing, fastening, and repairing their vessels; but they can not obstruct the owner's enjoyment thereof beyond the reasonable limits of necessity imposed on them at the time. *Id.*
5. RIGHT TO REPAIR IS LIMITED TO CASES OF EMERGENCY, and private property can not be seized upon and used for the purpose of repairing, when other places might be obtained that would answer that purpose as well. *Id.*
6. MORE CONVENIENCE OF OWNER OF VESSEL will not justify him in using, for several weeks, the lands of a private owner on the bank of a navigable river, for the purpose of repairing his vessel, when he might have used the public docks for that purpose. *Id.*

WAYS.

See EASEMENTS AND SERVITUDES.

WILLS.

1. EQUITY CONSIDERS AS MONEY, LANDS directed in a will to be sold and converted into money; and where a testator directs his executors to sell all his real and personal property, and pay over the proceeds to his son's guardians, whom he directs to use the interest for the support and education of his son, and to pay to him the principal on his attaining his majority, such realty will be considered as having been, by the directions of the will, converted into money, although it was never sold by the executors. *Burr v. Sim*, 48.
2. SAID SON MAY, ON ATTAINING HIS MAJORITY, ELECT to treat the real estate unsold as land, and the fact that he thereafter devises it as such, is proof of his determination so to reconvert it. *Id.*

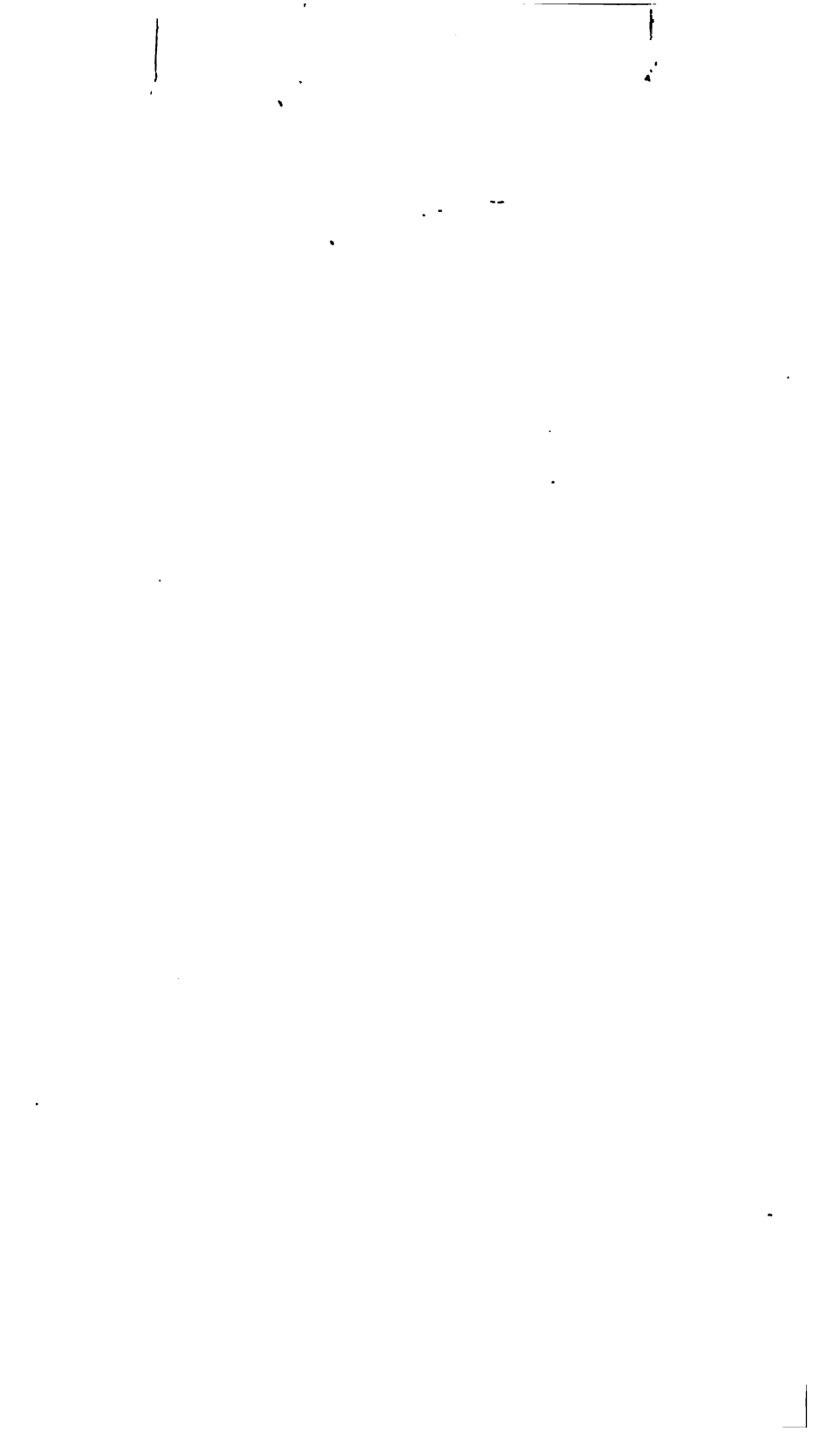
2. BY MAKING SUCH ELECTION, HE TAKES AS A PURCHASER, and not by inheritance, and any portion of such estate undisposed of by him goes, under the act of 1794, to his heirs on the maternal as well as to those on the paternal side. *Id.*
4. DEVISE OF SUCH REAL ESTATE BY HIM, WITHOUT WORDS OF INHERITANCE, passes a life estate only. *Id.*
5. REVOCATION OF WILL can not be made by one insane or not of sufficient capacity to understand the nature of his act. *Apperson v. Cottrell*, 239.
6. LOST OR DESTROYED WILL may be established and admitted to probate. *Id.*
7. WILL DESTROYED BY THE TESTATOR while insane, may be admitted to probate, if properly proved. *Id.*
8. WILL, INTENTION OF TESTATOR governs construction of; and technical signification of words must yield to testator's intent, as manifest from the whole will. *Scott v. Nelson*, 266.
9. CHILDREN.—THIS WORD, WHEN USED IN A WILL, does not ordinarily include grandchildren; but grandchildren and great-grandchildren may take under this word, if necessary to accomplish the testator's intentions. *Id.*
10. GRANDCHILDREN will be deemed comprehended in the term children: 1. Where it is necessary to give the will any meaning. 2. When other words in the will show that the testator did not use the word children in its ordinary or limited sense. *Id.*
11. CONSTRUCTION OF A WILL.—B., by his last will, gave his property to his wife for life, and, at her death, to be equally divided between his children. He then stated that certain of his children had received specified advances, and that his son "Turner, in his life-time," had received one thousand four hundred dollars, and directed that these advances be accounted for before any distribution be made. It was held that a grandchild, who was a son of the deceased Turner, was entitled to receive a share as one of the children. *Id.*
12. EXECUTORY DEVISES UPON THE DEATH OF THE DEVISEE descend in the same course of descent, that does other real estate or interest in real estate, in all cases where the will establishing the devise, describes the devisee with certainty. *Kean v. Haffecker*, 336.
13. THE INTENTION OF A TESTATOR is to be collected from the will itself. *Id.*
14. TECHNICAL WORDS, or words of a settled legal construction used in a will, will be intended by the court to have been understood by the testator in their proper meaning, unless it plainly appear from other parts of the will that they were used otherwise, or unless a different construction is necessary in order to give sense to the will. *Id.*
15. THE DIVISION OF PROPERTY DEVISED TO KIN of different degrees of relationship is to be *per capita*, not *per stirpes*, where the devisees are individually named; and it is enough to put the rule into operation, that, though in the devise there is no mention of the names of the devisees, there is in it a specific reference to another part of the will in which such names are set out. *Id.*
16. THE WORDS "equally to be divided" in a devise to kindred will cause the division to be *per capita*, though it is to kindred in different degrees of relationship. *Id.*

17. **EXECUTORY DEVISES ARE ASSIGNABLE**, devisable, and transmissible to the representatives of the devisee, provided that the identity of the latter is certain, even before the happening of the contingency, and that the object of the devise is fixed. *Id.*
18. **FREE PASSES BY THE WORDS "ALL MY REAL AND PERSONAL ESTATE,"** in a will. *Godfrey v. Humphrey*, 621.
19. **REVOCATION OF WILL, WHAT AMOUNTS TO.**—A testator, by directing several interlineations and erasures to be made in his will, with the avowed purpose of revoking it, and by delivering it in that condition, to a person, to be used as a memorandum in drafting a new will, gives sufficient proof of his determination to revoke such will. *Bohannon v. Walcot*, 631.
20. **REVOCATION OF A SUBSEQUENT WILL** does not, *ipso facto*, revive a former will which had been expressly or impliedly revoked by the latter. *Id.*
21. **WILL, WHEN REVOKED**, has neither a present nor a potential existence, and it requires a new testamentary act on the part of the testator to revive it. *Id.*

WITNESSES.

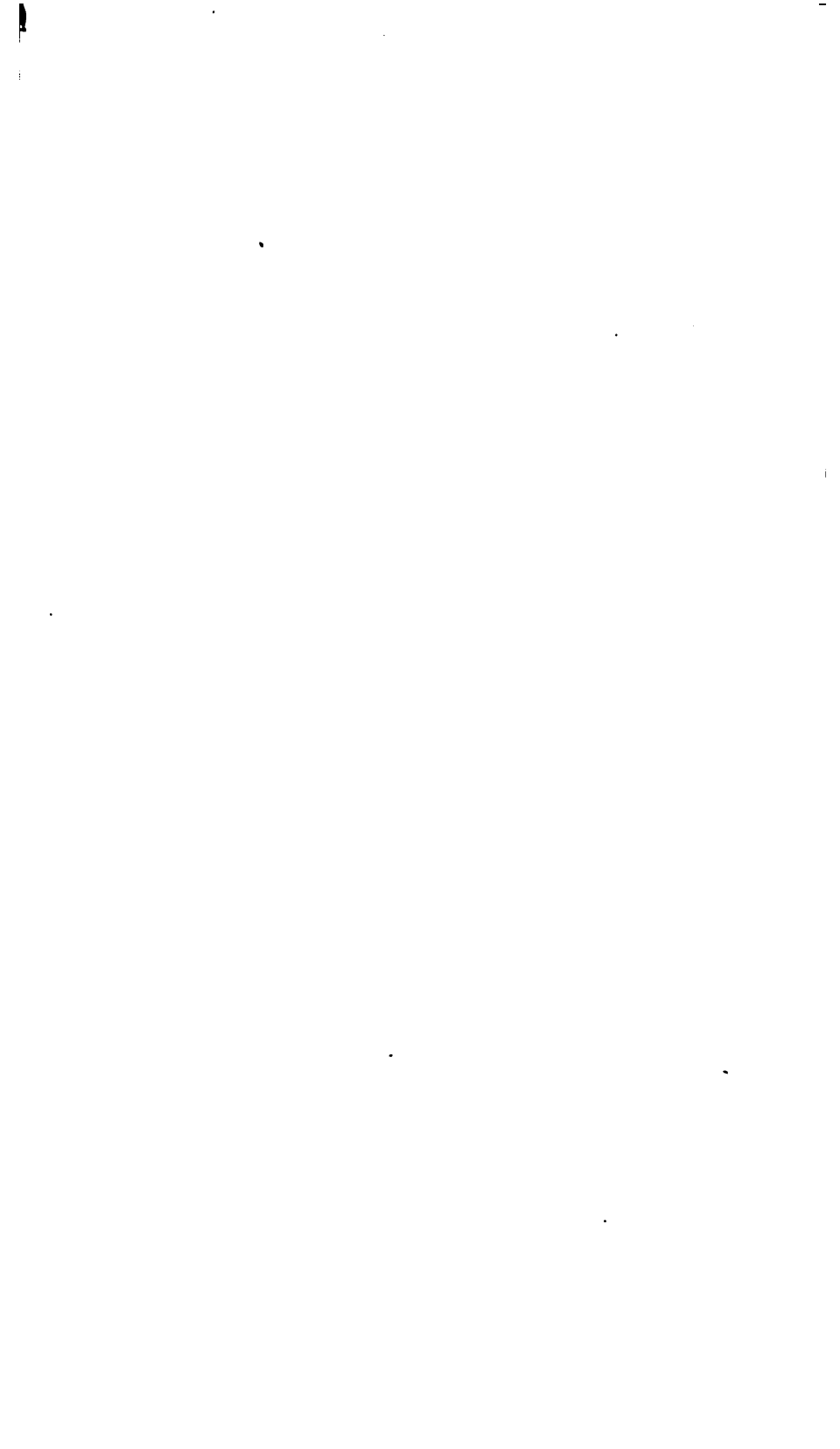
AGENT OF CORPORATION DEFENDANT, who is also a stockholder therein, is not a competent witness for it in an action on a contract made by him as its agent; for he has a direct interest in the result of such action independently of his acts as agent. *Pa. etc. Nav. Co. v. Dandridge*, 543.

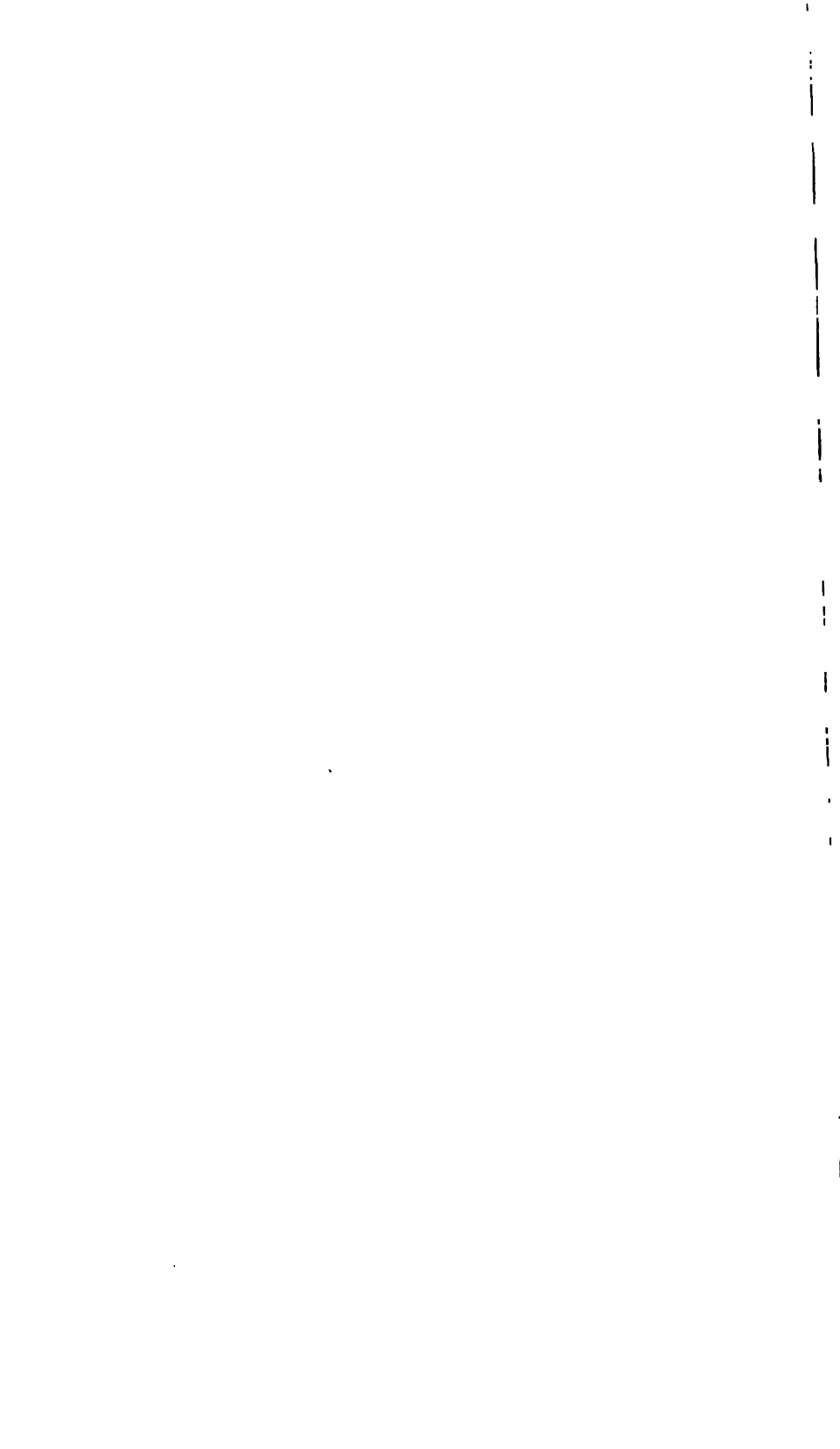
See EVIDENCE, 1, 2.



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USES ARE ASSIGNABLE, devisable, and transmissible
of the devises, provided that the identity of the contingence





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